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A

TREATISE

ON

THE LAW RELATIVE TO

SALES

OF

Personal Property.

By GEORGE LONG, Esq.
BARRISTER AT LAW.

Modus hujusmodi judicia excipiendi, et in scripta referendi, talis esto. Casus præcise, judicia ipsa exacte perscribito. Rationes judiciorum, quas adduxerunt judices, adjicito: Casuum, ad exemplum adductorum, auctoritatem, cum casibus principalibus, ne commisceto: de advocatorum perorationibus, nisi quidpiam in iis fuerit admodum eximium, sileto.

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PREFACE.

IN the following work the author has endeavoured to collect and arrange the various authorities which are to be found in our law-books respecting the sale of personal property. He has been encouraged in his undertaking by a consideration of the importance of the subject, and by the circumstance of one work only (Mr. Ross's Treatise on the Law of Vendors and Purchasers of Personal Property,) having appeared upon it. That book was published in the year 1811, since which time many important adjudications on the subject have taken place in the Courts of Law. If Mr. Ross had still been alive, the work which is now offered to the Public would probably not have been undertaken.

The arrangement of this work is entirely different from that of Mr. Ross's book; but the author feels himself bound to acknowledge the assistance which he has derived from it. He also owes considerable obligations to several other treatises on different branches of the Law, all of which are, he believes, referred to in the margin, except Mr. Whitaker's work on the Law of Lien, and Stopping in Transitu, to which he is much indebted.

Though the purpose of the present treatise is to exhibit the law *as it is*, and the author has given no opinion of his own where all the authorities are consistent, yet, on points where there are inconsistent and conflicting authorities, he has thought himself justified in concisely discussing the subject, and laying his own conclusions before the reader.

The subject of the transfer of ships by sale, having been fully investigated in the Lord Chief Justice's learned work on the Law of Shipping, is omitted here. The remedies which are given by law for the breach of contracts of sale seeming to belong more properly to works which treat of actions, pleadings, and the law of *Nisi Prius*, have also been omitted.

The arrangement of the work is as follows: The parties to the sale, and the disabilities of infants, married women, alien enemies, &c. to contract, are first considered. The validity of the sale itself then comes to be investigated, and the enactments of the statute of frauds, and of the stamp-acts; the effect of fraud in vitiating sales; and the illegality of sales prohibited by statute, of trading with an enemy, and of contracts of an immoral nature, are discussed. The next subject is sales in *market overt*, where the seller has no property in the goods sold. Then follow the construction of contracts of sale, where the terms of them are ambiguous; warranties, express and implied; sales by auction, and rescinding contracts by the parties. The mode by which the transfer of the property from the vendor to the vendee takes place, either by an actual or symbolical delivery of the goods, or by indorsement of a bill of lading, is next investigated. Then come stopping *in transitu*; the effect of bankruptcy on sales, where the bankrupt is allowed to remain in possession of goods which are not his own, and of a fraudulent preference by a trader of a particular

creditor, in contemplation of bankruptcy. The only remaining subjects are sales made by the intervention of factors, brokers, and agents, and the time and manner of payment for the thing sold by the purchaser.

It has been the earnest endeavour of the author to comprise these important subjects within as small a compass as possible; and he has taken as his guide, for the attainment of that end, the directions of *Lord Bacon*, contained in the Aphorism which has been selected as his motto. In what degree, or whether in any degree, he has been successful, must be left to the decision of a candid and liberal Profession.

Lamb Buildings, Temple,
Jan. 23d, 1821.

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ERRATA:

Page 4, line 22, *for* " nfant " *read* " infant"
— 16, — 1, *for* " hat " *read* " that"
— 52, — 22, *dele* " that "
— 54, — 7, *dele* " should "
— 59, — 8, *dele* " to "
— 60, — 19, *for* " seed " *read* " oil "
— 95, — 26, *for* " authorzie " *read* " authorise"
— 108, — 14, *dele* " he "
— 142, line 1, *for* " letters" *read* " letter".
— 168, — 5, *for* " by the law" *read* " by law "
— 196, — 11, *for* " invalidate " *read* " invalidates"
— 216, — 8, at the end, add " by"
— 240, note *for* " Faven" *read* " Faveux "

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A

TREATISE,

&c.

CHAP. I.

Of the Parties to the Sale.

A SALE is a transferring of property from one person to another, in consideration of a sum of money to be paid by the vendee to the vendor: and it differs from an *exchange* in this particular; that in a sale the recompense which the vendor is to receive is a payment in money, but in an exchange one parcel of goods is given for another, or one estate in land is granted in consideration of another (*a*). Both sales and exchanges are founded on a valuable consideration, by which the party who disposes of his lands or goods is induced to make the sale or exchange; the principles of law by which contracts of both kinds are regulated are precisely the same (*b*).

(*a*) 2 Bla. Com. 323. 446. (*b*) 2 Bla. Com. 446.

Property is classed by the law of England under two denominations, real and personal; which are thus distinguished by Mr. *Justice Blackstone* (*c*): "Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements; things personal are goods, money, and all other moveables, which may attend the owner's person wherever he thinks proper to go. Under the name of things personal (*d*) are included all sorts of things moveable, which may attend a man's person wherever he goes, and therefore, being only the objects of the law while they remain within its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immoveable, as land and houses, and the profits issuing thereout." *Personal property* is also subdivided into two classes, under the names of *chattels real* and *chattels personal*. Chattels real, are such as are said (in the language of the law) to concern or savour of the realty:—in other words, such as arise out of real estates, or are annexed to them, as leases of lands, &c. Chattels personal are things moveable, such as animals, household goods, money, jewels, corn, garments, and every thing else that can properly be set in motion, and transferred from place to place. (*e*)

This last class only is the subject of the present Treatise, in which we shall endeavour to ascertain

(*c*) 2 Bla. Com. 16.
(*d*) Ibid. 384.
(*e*) 2 Bla. Com. 386, 7.

the rules which are laid down as well by the common law as by various statutes, for the regulation of the transfer of chattels personal from one person to another in the way of sale.

It is essential to the validity of a contract of sale that the parties should be persons able to contract, and not labouring under any of those disabilities by which the law in some cases restricts, and in others altogether takes away, the right of particular individuals to enter into contracts, or prevents them from ever acquiring a right to contract. Where none of these disabilities exist all persons are allowed to become parties in contracts. Nothing need therefore be said of the qualifications of the contracting parties, except that all those to whom none of the disqualifications which will now be enumerated apply, must be considered to possess the rights of buying and selling, and of availing themselves of the remedies which have been provided by the law for any damage received by the breach of contracts into which they have entered.

1. The contracts of *infants*, that is, persons under the age of twenty-one years, are in many cases avoided by the law. This disability is, in fact, a privilege in favour of infants, who at that early age are not deemed to possess sufficient discretion to engage in contracts and affairs of business for themselves, but may be much better taken care of in general by being supplied with what they want by their parents or guardians. It might, however, be productive of very unhappy consequences if the con-

tracts of infants were in all cases to be avoided; and the law, therefore, with the benignity of a wise and kind parent, will support such engagements by infants as are really beneficial to them. Thus an infant may bind himself to pay for his necessary meat, drink, apparel, physic, good teaching and instruction (*f*). All these things are obviously for his benefit, and it is on that account that he is allowed to contract for them, and compellable to pay when they are provided for him. And if he marry, necessaries furnished to his wife will be considered in law the same as if they had been for himself (*g*). But though he may give a single bill for necessaries, and it will be binding (*i*), yet an obligation with a penalty given by him (*k*), or a bill of exchange, will be void; nor can he be charged on an account stated even for necessaries (*l*). And a bond given by him for necessaries is so completely avoided that he cannot ratify it after he comes of age (*m*).

What will be held necessaries will depend on his situation in life. Thus a livery for the servant of an nfant, who was a captain in the army, was considered necessaries; but cockades for the soldiers of his company were not (*n*). So regimentals furnished for an infant member of a volunteer corps are necessaries (*o*); and an infant has been held liable for money ad-

(*f*) Co. Lit. 172 a.

(*g*) *Turner* v. *Trisby*, Str. 168.

(*i*) *Russell* v. *Lee*, 1 Lev. 86.

(*k*) Ibid. *Fisher* v. *Mowbray*, 8 East, 330.

(*l*) *Trueman* v. *Hurst*, 1 T. R. 40. *Williamson* v. *Watts*, 1 Campb. 552.

(*m*) *Baylis* v. *Dinely*, 3 Ma. & Selw. 477.

(*n*) *Hands* v. *Slaney*, 8 T. R. 578.

(*o*) *Coates* v. *Wilson*, 5 Esp. 152.

vanced to liberate him from an arrest for necessaries, or from being taken in execution (*p*); but he is not liable to pay money which is lent him for the purpose of being laid out for necessaries (*q*). In equity, however, he is liable for money borrowed to pay a debt for necessaries (*r*). It seems that a promise made by an infant after he comes of full age, to pay a bill of exchange drawn by him during his infancy for necessaries, would be binding (*s*); but in cases of this sort an express promise is necessary to charge him; and a part payment of a coach-maker's bill after full age, was held by *Lord Kenyon* not to amount to a promise to pay the remainder (*t*); and such a promise must be made voluntarily, and with a full knowledge of his discharge (*u*). Where goods were delivered to a carrier for an infant before she came of age, and reached her on the day of her coming of age, she was held not liable in an action for the price of the goods (*x*). The decision of this case was founded on a doctrine of law, which we shall have occasion to consider fully in another part of the work, that the property in goods sold vests in the vendee as soon as they come into the hands of the carrier by whom they are to be conveyed to him. The contract therefore had been executed by the delivery of the goods to the carrier, and the property in them would have vested in the vendee at that

(*p*) *Clarke* v. *Leslie*, 5 Esp. 28.

(*q*) *Earle* v. *Peale*, 1 Salk. 386. *Probart* v. *Knouth*, 2 Esp. 472.

(*r*) 1 P.Wms. 559. 1 Fonbl. on Eq. 73.

(*s*) See *Taylor* v. *Croker*, 4 Esp. 188.

(*t*) *Thrupp* v. *Fielder*, 2 Esp. 628.

(*u*) *Harmer* v. *Killing*, 5 Esp. 102.

(*x*) *Griffin* v. *Langfield*, 3 Campb. 254.

moment if her disability to contract had not prevented it.

What are necessaries for an infant is a relative fact, to be governed in all cases by the fortune and circumstances of the infant; and it will be incumbent on a plaintiff suing an infant to inquire into these circumstances (*y*). If the infant lives with his father, and is properly maintained by him, he will not be bound for what would, under other circumstances, be considered necessaries (*z*).

The law will not allow an infant to do any act apparently for his prejudice, as to make a lease not rendering rent. He cannot appoint an attorney; neither can he give a warrant of attorney; nor make a deed. A covenant to bind himself an apprentice would have been void at the common law, except in the city of London, where it was good by custom; but by stat. 5 Eliz. c. 4, he may bind himself apprentice; he will not, however, be bound by a collateral covenant in a deed of apprenticeship. A sale of goods by him is void; and if he lose money at play he may recover it (*a*). By statutes 17 Geo. 3. c. 26, s. 6, and 53 Geo. 3, c. 141, s. 8, a contract by an infant for the purchase of an annuity is void. If he buy goods to trade with he is not bound to pay for them (*b*). But his privilege to avoid his contracts is personal, and does not extend to the person contracting with him, who is bound at all events: thus, where an infant had contracted for

(*y*) *Ford* v. *Fothergill*, 1 Esp. 211, and Peake 229. See Cro. Jac. 560. Palm. 361. Latch. 21. Cro. Eliz. 583.

(*z*) *Bainbridge* v. *Pickering*, 2 W. Bla. 1325.

(*a*) Com. Dig. *Enfant*, C. 2.

(*b*) *Whywall* v. *Champion*, Str. 1083. *Whittingham* v. *Hill*, Cro. Jac. 494.

all the potatoes which grew on a certain piece of land, and had paid part of the price, and dug up and taken away some of the potatoes, the Court of King's Bench, and the Exchequer Chamber afterwards on a writ of error, held that an action might be supported against the vendor for the remainder of the potatoes which he had prevented the infant from taking away (*c*). And where a father had induced traders with whom he had been in the habit of dealing to supply his son, who was an infant, with goods, under a fraudulent representation that he was about to relinquish business in favour of the son, though credit was given to the son, the father was held responsible for the price of the goods (*d*).

It is a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him (*e*). But where agreements are of an uncertain nature as to benefit or prejudice, they are not absolutely void, but voidable at the election of the infant. In illustration of this rule, the mode by which an infant must take advantage of his privilege, in pleading to an action brought against him on a deed which he has executed, may be noticed. He cannot plead *non est factum*, that is to say, he cannot say that it is not his deed, but he must plead his infancy, which is the regular mode of disaffirming the contract (*f*). So far indeed does the law extend its protection, that if a person, jointly interested with an

(*c*) *Warwick* v. *Bruce*, 2 Ma. & Selw. 205; and 6 Taunt. 118. See Bac. Abr. *Infancy*, I. 4. *Keane* v. *Boycott*, 2 H. Bla. 511.

(*d*) *Biddle* v. *Levy*, 1 Stark. 20.

(*e*) So laid down by Lord Mansfield, and adopted by Lord Hardwicke in *Drury* v. *Drury*, in the House of Lords, 2 T. R. 161.

(*f*) 2 H. Bla. 515.

infant in a lease, obtain a renewal to himself alone, if the lease prove beneficial he will be considered as a trustee for the infant for his share, though there was no clause of renewal in the original lease, and though if it had turned out prejudicial the lessee must have sustained the whole loss (*g*).

With respect to sales by infants the following distinctions have been laid down: If an Infant give or sell goods, and deliver them with his hand, he shall have no action of trespass against the donee or vendee by reason of the delivery; but if an infant give or sell goods, and the vendee or donee take them by force of the gift or sale, the infant may have an action against him (*h*).

2. *A married woman* lies under a still stronger disability to contract than an infant. She is called in the language of the law a *feme covert*, and her very existence is so completely identified in the eye of the law with that of her husband, that she is altogether incapable, except under particular circumstances, to become a party to any valid contract. By the marriage her personal property is transferred to her husband, who also becomes liable to pay her debts contracted before marriage.

A husband is in general liable for necessaries furnished to his wife suitable to her condition. If she live with him, that circumstance will be strong evidence of his assenting to her contracts, but he is at liberty to prohibit any individual from trusting her (*i*);

(*g*) Ex parte *Grace*, 1 Bos. & Pul. 376.

(*h*) See the observations of Hyde, J. in *Manby* v. *Scott*, 1 Mod. 137, and of Lord Mansfield in *Zouch* v. *Parsons*, 3 Burr. 1804.

(*i*) *Etherington* v. *Parrot*, Ld. Raym. 1006.

and he is in general the proper judge of what is necessary for her (*k*). But a general prohibition to all persons to supply the wife with necessaries is void (*l*). And though the wife live with her husband, if it be clearly proved that the credit was in fact given to the wife and not to the husband, he will not be liable (*m*). *Lord Kenyon* is said to have ruled at *Nisi Prius*, that if a husband give notice to a particular tradesman not to deal with his wife, unless she bring ready money, that tradesman cannot afterwards bring an action against the husband, even for necessaries (*n*). Improper and lewd conduct in the wife will not prevent the husband being bound to provide her with necessaries while he allows her to continue to reside with him (*o*). And though a husband is separated from his wife, yet if he have any control over goods purchased by her, he will be liable to pay for them if he do not return them (*p*). And if he turn his wife out of doors, or refuse to receive her, without a sufficient cause, he will be liable for her necessaries (*q*); and he cannot prohibit a particular person from trusting her in such case (*r*). But if the wife quit her husband voluntarily, on account of ill treatment short of violence, or such as induces a reasonable fear of it, he will not be chargeable (*s*). A man is also charge-

(*k*) See the argument of Hale, C. B. in *Manby* v. *Scott*, Bac. Abr. Bar. & Feme. H.

(*l*) 1 Sid. 109. 2 New Rep. 157.

(*m*) *Bentley* v. *Griffin*, 5 Taunt, 356.

(*n*) 1 Bla. Com. by Christian, 442, note 17.

(*o*) Per Holt, C. J. in *Robinson* v. *Greinold*, 1 Salk. 119, & 6 Mod. 171.

(*p*) *Waithman* v. *Wakefield*, 1 Campb. 120.

(*q*) *Thompson* v. *Hervey*, 4 Burr. 2177.

(*r*) *Bolton* v. *Prentice*, Str. 1214.

(*s*) *Horwood* v. *Heffer*, 3 Taunt. 421.

able for goods sold to a woman whom he represents to be his wife, though they are not in fact married (*t*).

A husband is not liable for necessaries for his wife who goes off with an adulterer (*u*). But where the wife had committed adultery, and the husband had left her in his house, with two children born in wedlock, and bearing his name; though she continued to carry on the adulterous intercourse there, her husband was held liable for necessaries furnished to her; but if it had appeared that the tradesman who furnished them knew, or ought to have known, the circumstances under which she was living, the husband would have been exonerated (*x*).

If a man marry a woman, and hold her out to the world as his wife, he does not discharge himself from his liability for necessaries furnished to her by proving a previous marriage between himself and another woman still alive, unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife (*y*).

And even where the husband had himself committed adultery with a woman whom he had brought home, had treated his wife with great cruelty, and had turned her out of doors, after which the wife committed adultery, and then offered to return to her husband, but he would not receive her, the Court of *King's Bench* held that he was not bound to

(*t*) *Watson* v. *Threlkeld*, 2 Esp. 637. *Robinson* v. *Nahon*, 1 Campb. 245.

(*u*) *Manby* v. *Scott*, 1 Sid. 109. *Morris* v. *Martin*, Str. 647.

(*x*) *Norton* v. *Fazan*, 1 Bos. & Pul. 226.

(*y*) *Robinson* v. *Nahon*, 1 Campb. 245.

receive or support her (z). But if he receive her after she has committed adultery, he cannot, by afterwards turning her out, get rid of his responsibility for necessaries furnished to her after he has obliged her to leave him (a).

If a wife voluntarily elope from her husband, but not with an adulterer, and afterwards solicit her husband to be received again, and he refuse to receive her, it seems that he will be bound from that time for necessaries furnished to her (b).

Where a wife lives apart from her husband, and has a separate maintenance, he will not be answerable for debts contracted by her, though the person trusting her has had no notice of the separation, if it be the reputation of the place where the husband lives that he is separated from his wife; but if the wife had come from her husband immediately after the separation, before it could have been publicly known, and had taken up necessaries upon credit, the husband would have been liable (c). And if the husband make his wife an adequate maintenance he will not be chargeable, though it be not secured by deed; but the allowance must be sufficient according to the husband's circumstances, and the mere acquiescence of the wife will not prove its adequacy (d). If, however, a husband covenant by deed with a trustee to make a separate provision for his wife, and she

(z) *Govier* v. *Hancock*, 6 T. R. 603.

(a) *Harris* v. *Morris*, 4 Esp. 41.

(b) Per Ld. Eldon in *Ewers* v. *Hutton*, 3 Esp. 256. See *Child* v. *Hardyman*, Str. 875, and the cases collected in Str. 1214, note 1.

(c) *Todd* v. *Stokes*, 1 Ld. Raym. 444.

(d) *Hodgkinson* v. *Fletcher*, 4 Campb. 70.

then leave him, if he afterwards fail to pay the stipulated allowance, and the trustee provide the wife with necessaries, he may sue the husband in an action of *indebitatus assumpsit*, notwithstanding the deed (*e*). But alimony allowed the wife by the Ecclesiastical Court, pending a suit there between her and her husband, will not make her personally liable on her contracts (*f*). It was decided, on great consideration, in the case of *Marshall* v. *Rutton* (*g*), (although the contrary doctrine had been sanctioned by earlier cases) that a *feme covert* living apart from her husband, with a separate maintenance secured by deed, could not be sued as a *feme sole*. A person contracting with a married woman under such circumstances would however be relieved in equity. It is presumed, on the principle of this case, that an adulteress living apart from her husband would not be liable to be sued on her contracts, though the Judges of the *Common Pleas*, in a previous case, seemed to think her liable (*h*).

There are some cases in which a married woman is allowed to contract and sue as a *feme sole*. These are cases in which a complete separation has taken place between her and her husband, by the husband leaving the realm, and his wife being consequently deprived of his protection and support, and no longer subject to his control; as, if he abjure the realm, or be banished for life (*i*); and, as it seems, if he be trans-

(*e*) *Nurse* v. *Craig*, 2 New Rep. 148.

(*f*) *Ellah* v. *Leigh*, 5 T. R. 679.

(*g*) 8 T. R. 545.

(*h*) *Cox* v. *Kitchin*, 1 Bos. & Pul. 338. See *Hatchett* v. *Baddeley*, 2 W. Bla. 1079.

(*i*) Co. Litt. 133 a.

ported (*k*), and even if he remain abroad beyond the period to which his sentence of transportation was limited (*l*). The authorities are inconsistent upon the question, how far the wife of an alien residing abroad, or of a native who has absented himself from his country, is liable to be treated as a *feme sole*; it seems, however, on an investigation of the cases, that the principle which they establish is, that the wife's liability depends entirely on the fact of her husband's absence being intended to be temporary or permanent; when the absence is merely temporary she is at liberty to avail herself of her coverture as a defence to any action brought against her; but if the husband's absence is intended to be permanent, the wife may contract, and is liable to be sued on her contracts precisely as a *feme sole*; and though a distinction has often been attempted to be set up between the wife of an alien and of a native, that distinction does not appear to be well warranted, but both seem to stand entirely on the same footing (*m*).

A *feme covert* may, by the custom of the city of *London*, trade there as a *feme sole*, and if she trade by herself in a business in which her husband does not intermeddle, she may be sued in the city courts, the Husband being only named with her a party in the action for conformity; and if judg-

(*k*) *Sparrow* v. *Carruthers*, quoted 2 W. Bla. 1197.

(*l* *Carrol* v. *Blencow*, 4 Esp. 27. *qu.* see 2 Bos. & Pul. 232.

(*m*) *Deerly* v. *Duchess of Mazarine*, Salk. 116. 646. 1 Ld. Raym. 147. S. C. *De Gaillon* v. *L'Aigle*, 1 Bos. & Pul. 357. *Marsh* v. *Hutchinson*, 2 Bos. & Pul. 226. *Walford* v. *Duchesse de Pienne*, 2 Esp. 554. *Franks* v. *Duchesse de Pienne*, 2 Esp. 587. *Burfield* v. *Duchesse de Pienne*, 2 New Rep. 380. *Kay* v. *Duchesse de Pienne*, 3 Campb. 123. *Farrer* v. *Lady Granard*, 1 New Rep. 80.

ment be given against her and her husband, execution can be had against the wife only (*n*); but she cannot be sued as a *feme sole* in the courts at *Westminster* (*o*).

The Queen Consort may contract, and sue and be sued as a *feme sole* (*p*).

3. The contracts of *idiots, lunatics,* and *persons labouring under a defect in the understanding, of such a nature as to render them incapable of comprehending the nature of the engagements they enter into,* are not absolutely void, but merely voidable. During the continuance of idiocy or lunacy their contracts may be avoided by the King; and though a strange rule of law, that a man shall not be permitted to stultify himself, was formerly adopted; founded on as strange a reason; namely, that a man shall not be allowed to disable himself by pleading his incapacity, because he cannot know what he did in such a situation; and though the authority of the rule does not appear ever to have been expressly denied, yet good sense has led to the adoption of an evasion of it, which prevents the mischief it is calculated to produce (*q*). Thus it has been held in an action on a deed, that under the plea of *non est factum,* evidence may be given that the defendant was a lunatic at the time when he executed the deed (*r*); and in a similar case, proof of the defendant being so *drunk* as not to know what he did at the time of executing the instrument, has been held admissible to

(*n*) *Langham* v. *Bewett,* Cro. Car. 68.

(*o*) *Beard* v. *Webb,* 2 Bos. & Pul. 93

(*p*) Co. Lit. 133 a.

(*q*) See Co. Lit. 247. 2 Bla. Com. 291, 2.

(*r*) *Yates* v. *Boen,* Str. 1104

avoid it (*s*). And in an action of *assumpsit* on a written agreement, where the plea was *non assumpsit*, evidence having been adduced that the defendant was in a state of complete intoxication when he executed the agreement, *Lord Ellenborough* directed a non-suit, saying there was no agreement between the parties, as the defendant had not an agreeing mind when he signed the paper (*t*). Whether after these decisions the old rule is still to be allowed to intrench itself behind special-pleading technicalities, it seems not necessary very anxiously to inquire; but we may safely infer from them, that in all cases parties will now be allowed, either by pleading or by evidence, to defend themselves from the perilous consequences of engagements in which, though the hand was made to perform its mechanical office, the assenting mind was altogether wanting.

4. In the same manner contracts made under *duress*, as by actual imprisonment, or fear of loss of life or member, or of mayhem, or imprisonment, are voidable by the party suffering the duress; but the fear of battery, or having his house burned, or his goods taken away or destroyed, is said not to be a sufficient duress to avoid a man's contracts (*u*).

5. When a commission of *bankrupt* issues against a trader, the assignment of the commissioners has relation to the act of bankruptcy; and previous to the stat. 46 Geo. 3. c. 135, all contracts entered into by the bankrupt from the time of the act of bankruptcy were avoided. By that act, sect. 1, it is enacted,

(*s*) *Cole* v. *Robins*, Bull. Ni. Pri. 172.

(*t*) *Pitt* v. *Smith*, 3 Campb. 33.

(*u*) 2 Inst. 483.

hat "all contracts, and other dealings and transactions by and with any bankrupt, *bona fide* made or entered into more than two calendar months before the date of such commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed; provided the person or persons so dealing with such bankrupt had not at the time of such contract, dealing or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment." Sales of goods by bankrupts (which are not within the protection of the statute) may be avoided by their assignees; but if the assignees do not choose to interfere, such sales are valid as to other persons, and it is not competent to a third person to object to them on account of the vendor being an uncertificated bankrupt (*x*); but the assignees are at liberty to assent to contracts made by a bankrupt, and if they do so he will be considered their agent (*y*).

6. The goods and chattels of *convicted criminals* are forfeited on their conviction of high treason, misprision of treason, petit-treason, felony in general, felony *de se*, manslaughter, excusable homicide, outlawry for treason or felony; by conviction of petty larceny; by flight in treason or felony, even though the party be acquitted of the fact; by standing mute

(*x*) *Ashley* v. *Kell*, Str. 1207. *Laroche* v. *Wakeman*, Peake, 140. *Fowler* v. *Down*, 1 Bos. & Pul. 44. *Webb* v. *Fox*, 7 T. R. 391.

(*y*) *Evans* v. *Mann*, Cowp. 569. See *Kitchen* v. *Bartsch*, 7 East, 53.

when arraigned for felony; by drawing a weapon on a judge, or striking any one in the presence of the King's courts; by præmunire; pretended prophecy, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to fight on account of money won at gaming. This forfeiture, unlike the forfeiture of real property, commences from the time of conviction, and not from the time of committing the fact; and of course from the time of the forfeiture the criminal can make no sale or disposition of his goods, but previous to the conviction, part, or the whole, of the offender's goods may be expended in maintaining him between the time of committing the fact and conviction (*z*); but a fraudulent conveyance of them, intended to defraud the crown, would be void (*a*).

7. With respect to *aliens*, the law makes a wide distinction between those who are the subjects of powers at peace with us, and who are called alien friends; and alien enemies, that is, the subjects of those nations with whom we are at war. An alien friend is allowed to buy and sell, and to bring personal actions in our courts equally with a native (*b*); but it is a general rule of law that no action will lie by or in favour of an alien enemy (*c*). If, however, an alien enemy come here under safe conduct he may maintain an action. And if an alien friend come here in time of peace by the license of the king, and live here under protection, and afterwards war break out between this country and his own, he

(*z*) 2 Bla. Com. 421.

(*a*) *Jones* v. *Ashurst*, Skinner, 357.

(*b*) Dyer, 2 b. Co. Lit. 129 b.

(*c*) *Brandon* v. *Nesbitt*, 6 T. R. 23.

may still support an action in our courts (*d*). And where a trading with an enemy for specie to be brought from the enemy's country in his ships into our colonial ports, was licensed by the king's authority, it was held, that an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of British subjects, was incidentally legalized; and that it was competent for a British agent of both parties, in whose name an insurance had been effected, to sue upon the policy in time of war; the trust contravening no rule of law, or of public policy, and there being no personal disability in the plaintiff on the record to sue (*e*).

A British subject (and, as it seems, a neutral) residing in a hostile country, and carrying on trade there, is an alien enemy (*f*).

In the case of *Ricord* v. *Bettenham* (*g*), it was held, that an action would lie by an alien enemy, who was the captain of a French privateer, against the captain of an English ship, on a ransom bill, given by him for the ransom of his ship which had been taken by the privateer; and *Cornu* v. *Blackburne* (*h*), was a decision on the same point, with this difference, that in *Ricord* v. *Bettenham*, the action was brought after a peace, but in *Cornu* v. *Blackburne*, during the continuance of the war. In a later case (*i*), however, the court of *King's Bench* was divided in opinion on the same point, and it was

(*d*) *Wells* v. *Williams*, 1 Ld. Raym. 282, and 1 Salk. 46.

(*e*) *Kensington* v. *Inglis*, 8 East, 273.

(*f*) *M'Connell* v. *Hector*, 3 Bos. & Pul. 113. *O'Mealey* v. *Wilson*, 1 Campb. 482.

(*g*) 3 Burr. 1734, and 1 W. Bla. 563.

(*h*) Dougl. 640.

(*i*) *Anthon* v. *Fisher*, Dougl. 649, note.

ultimately decided in the *Exchequer Chamber*, that an alien enemy cannot sue for a right claimed to be acquired by him in actual hostility. Ransom bills have since been declared illegal by statute (*k*).

It seems not to be settled whether an alien enemy, residing in this country during war, may support an action on a mere civil contract not founded on a right acquired by actual hostility. There does not appear to be in the books any distinct explanation of what is meant by an alien residing here *by the license and under the protection* of the King. It has been stated by high authority, that there is a protection arising from situation, as in the case of a prisoner at war, or an officer upon his parol (*l*). In support of a replication to a plea of alien enemy, that the alien resided here by the license and under the protection of the King, *Lord Ellenborough* held that it was necessary either to produce a protection granted to the alien, or to show in some other way that his stay after the commencement of hostilities had been sanctioned by the King (*m*). It has also been held not enough to prove that an alien resided here with a license granted under statute 38 Geo. 3. c. 77, (which was a temporary act) till that act expired, and continued afterwards to reside without molestation (*n*). It seems from these cases that an alien, who, having resided here in time of peace, should continue to do so after the breaking out of a war between this country and his own, would not be protected by the mere

(*k*) 22 Geo. 3. c. 25.

(*l*) See 1 Bos. & Pul. 171. 1 Taunt. 36,7.

(*m*) *Boulton* v. *Dobree*, 2 Camp. 163.

(*n*) *Alciator* v. *Smith*, 3 Campb. 245.

circumstance of such residence without disturbance by the government.

There does not appear to be any objection to an alien under such circumstances suing, after the return of peace, on a contract made during the war (*o*).

A native of a neutral state taken fighting on board an enemy's ship, and afterwards working his way to England as a seaman on board a British ship, was held entitled to sue for his wages (*p*). Two of the Judges (*Heath* and *Rooke*), in giving their judgments, laid it down generally, that a prisoner may contract; but *Lord Chief Justice Eyre* gave no opinion on that point. The same point came afterwards expressly in discussion in the *Common Pleas*, but the Judges being divided in opinion, no judgment was given (*q*).

If a neutral country be taken possession of by the forces of a state at war with this country, but the civil authorities of the invaded country continue to exercise their functions, though such country commit hostile acts against us, yet if our government do not act with hostility towards them, or show by any act that it considers them as standing in a relation of hostility, the subjects of such invaded country are not alien enemies (*r*).

Though the subjects of states are in general to be considered as parties to the acts of their respective governments (*s*), yet if the Crown grant a license to

(*o*) See Lord Kenyon's judgment in *Brandon* v. *Nesbitt*, 6 T. R. 28. *Antoine* v. *Morshead*, 6 Taunt. 237.

(*p*) *Sparenburgh* v. *Bannatyne*, 1 Bos. & Pul. 163.

(*q*) *Maria* v. *Hall*, 1 Taunt. 33.

(*r*) *Hagedorn* v. *Bell*, 1 Ma. & Selw. 450.

(*s*) *Conway* v. *Grey*, 10 East, 536.

trade to an alien enemy, he may sue in our courts for any cause of action arising out of such trading (*t*).

The next subject for our consideration will be the right which one *partner* has to bind his partners in a contract of sale entered into by him for the firm. In general a contract made by one partner binds the whole firm; and not only are all the partners liable collectively to fulfil the terms of such contract, but each individual partner is liable to the whole amount of the goods sold, or the price stipulated to be paid, such contracts being deemed by the law to be joint and several (*u*). And it makes no difference that a partner who purchases goods buys them with an intention of cheating his partners, and actually applies them to his own use; for, unless the seller is guilty of collusion with the partner who makes the purchase, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied (*x*).

The acceptance or indorsement of a bill of exchange by one partner binds the firm (*y*); and if one partner accept a bill in the name of the other it binds both (*z*): but where one partner indorsed a bill with the partnership firm, but at the same time told the indorsee that he wished it to be kept a secret from his partner, *Lord Kenyon* held that the indorsee could

(*t*) *Usparicha* v. *Noble*, 13 East, 332. *Flindt* v. *Scott*, 5 Taunt. 674; and see the cases referred to, post, ch. 2.

(*u*) See the judgment of Lord Mansfield in *Rice* v. *Shute*, 5 Burr. 2613.

(*x*) *Bond* v. *Gibson*, 1 Campb. 185.

(*y*) *Swan* v. *Steele*, 7 East, 210.

(*z*) *Mason* v. *Rumsey*, 1 Campb. 384; and see *Ridley* v. *Taylor*, 13 East, 175.

not sue the partnership (*a*); and the implied authority of one partner to draw bills of exchange and promissory notes to bind the firm, may be rebutted by proof of express previous notice having been given to the party taking the security, that the other partners would not be liable for it; though it was represented to the holder by the partner signing the security, that the money advanced on it was raised for the purpose of paying the partnership debts, and though the greater part of it was in fact so applied. And he cannot even recover the amount of the money so applied to the payment of the partnership debts (*b*). Money lent to one of the partners while employed in partnership transactions, and on account of the firm, binds the partnership to the payment of the debt so contracted (*c*).

One partner is not authorized to bind the partnership by guaranteeing the debt of a third person, without a special authority from his partners (*d*); neither can he bind the others by deed (*e*); but where a deed was executed by one partner for both, in the presence and by the authority of the other, the deed was held valid against both, though only sealed once (*f*).

Acts subsequent to the delivery of goods on a contract may be admitted as evidence to show that the goods were delivered on a partnership account, if it

(*a*) *Arden* v. *Sharpe*, 2 Esp. 524.

(*b*) *Lord Gallway* v. *Mathew*, 10 East, 264. See *Ridley* v. *Taylor*, 13 East, 175.

(*c*) *Rothwell* v. *Humphreys*, 1 Esp. 406.

(*d*) *Duncan* v. *Lowndes*, 3 Campb. 478.

(*e*) *Harrison* v. *Jackson*, 7 T. R. 207.

(*f*) *Ball* v. *Dunsterville*, 4 T. R. 313.

were doubtful at the time of the contract whether the sale were made to a partnership, or to the individual purchasing only; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner will make him liable in an action for goods sold and delivered (*g*). When one partner orders goods without disclosing the names of the other partners, and the goods are afterwards delivered to them all, they are all liable (*h*). If several persons agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, though he be not expressly authorized to purchase for the three, it is the same in effect as if all the names had been announced to the seller, and all three are answerable for the value of the goods (*i*). But if several persons horse, with horses their separate property, the several stages of a coach, in the general profits of which they are partners, they are not jointly liable for hay and corn furnished to one partner for the use of the horses drawing the coach along his part of the road (*k*).

If persons hold themselves out to the world as partners they will be liable to fulfil the engagements entered into by an individual for them all, though by a secret stipulation among themselves there be no actual partnership between them (*l*). But though persons are partners in a particular concern, that cir-

(*g*) *Saville* v. *Robertson*, 4 T. R. 720.

(*h*) Per Buller, J. S. C.

(*i*) *Gouthwaite* v. *Duckworth*, 12 East, 421.

(*k*) *Barton* v. *Hanson*, 2 Taunt. 49.

(*l*) *Waugh* v. *Carver*, 2 H. Bla. 235. *Hesketh* v. *Blanchard*, 4 East, 144.

cumstance will not be sufficient to make them liable in other cases not connected with such particular business, if they do not appear to the world as general partners (*m*). Where there is a stipulation between persons who act as partners to the world, that one of them shall not share the profits, or be liable as partner, he will be discharged of his liabilities as far as regards those who have notice of such stipulation; and notice given to one member of a firm will be good notice to the whole firm (*n*).

An act of bankruptcy committed by one partner dissolves the partnership firm, and deprives him of the right of disposing of the partnership goods (*o*); but, notwithstanding a secret act of bankruptcy by one partner, a sale of goods by the solvent partner, made *bonâ fide* for a valuable consideration, and without fraud, is valid; and the vendee is entitled to retain the goods against the assignees of the bankrupt (*p*).

When a dissolution of a partnership takes place the retiring partner is bound to give notice of such dissolution to all persons with whom the partnership has had dealings, in order to protect himself from demands on subsequent dealings with the other partners (*q*): Publication of the dissolution in the Gazette will be sufficient notice to the rest of the world (*r*). But

(*m*) *De Berkom* v. *Smith*, 1 Esp. 29.

(*n*) *Alderson* v. *Pope*, 1 Campb. 404, note.

(*o*) *Hague* v. *Rolleston*, 4 Burr. 2174.

(*p*) *Fox* v. *Hanbury*, Cowp. 445.

(*q*) *Graham* v. *Hope*, Peake 154. *Parkin* v. *Carruthers*, 3 Esp. 248.

(*r*) *Gorham* v. *Thompson*, Peake, 42. *Godfrey* v. *Macauley*, Peake, 155, note; and 1 Esp. 371. *Newsome* v. *Coles*, 2 Campb. 617.

a dormant partner who has never appeared to the world, or been known as a partner, is not bound to give notice of withdrawing himself from the firm (*s*).

If after a regular dissolution of a partnership a bill of exchange be sent into circulation by the partners, they must all join in the indorsement; and one of the dissolved firm cannot by putting the partnership name on the bill charge the rest (*t*).

CHAP. II.

Of the manner in which a valid Sale may be made, and of circumstances which invalidate a Sale.

NO particular form is required by the law of England for transferring property by way of sale from one person to another. This may be done either by a written agreement between the parties, or by a mere verbal contract, subject indeed to such regulations as are required by several statutes which have from time to time been passed by the Legislature relative to such contracts. We shall first consider the law of sales, where the vendor has a property in the thing sold, and afterwards direct our attention to certain cases, in which, though the

(*s*) *Evans* v. *Drummond*, 4 Esp. 89.

(*t*) Per Lord Kenyon in *Abel* v. *Sutton*, 3 Esp. 112. *Newsome* v. *Coles*, 2 Campb. 617, accord.

vendor has in fact no property in the subject-matter of the sale, it is nevertheless considered by the law to be a valid sale.

It is not intended to state here the various modes by which a property in personalty may be acquired, this work being confined to one of those modes, namely, that by sale; but, assuming the vendor to have in himself the property in the goods which he intends to sell, he will be at liberty to dispose of them, at any time, to whomsoever and in whatever manner he pleases, provided judgment has not been obtained against him for a debt or damages, and the writ of execution actually delivered to the sheriff (*u*). At common law, if a judgment had been obtained against a man in a civil suit, and a writ of execution had issued, the property in his goods would have been bound to answer the debt from the *teste* of the writ (*x*); but by the statute of frauds (*y*) a writ only binds the property from the time it is delivered to the sheriff: this alteration was made in favour of purchasers, and the rule of the common law still remains in force between the parties; therefore, if a defendant die after the awarding of the writ, and before it is delivered to the sheriff, his goods are bound by it in the hands of the executors (*z*). If two writs are delivered to the sheriff on the same day, he is bound to execute that first which comes first to his hands; but if he levy and sell under the second,

(*u*) 2 Bla. Com. 447.

(*x*) *Sir Gerrard Fleetwood's* case, 8 Co. 171. *Farrer* v. *Brooks*, 1 Mod. 188.

(*y*) 29 Car. 2, c. 3.

(*z*) *Oades* v. *Woodward*, 7 Mod. 93.

the sale is good, unless the purchaser have notice of the prior claim, which will avoid the sale (*a*).

By the 4th section of the statute of frauds, which has just been referred to, it is enacted (*b*), "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And by the seventeenth section of the same statute it is enacted, that "no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Much discussion has arisen in the courts respecting the meaning of the terms "some note or memorandum of an agreement," used in the fourth section of the statute of frauds; and some of the highest authorities in the law seem to have differed in the sense

(*a*) *Smallcomb* v. *Buckingham*, 1 Salk. 319, and Carth. 420. *Hutchinson* v. *Johnston*, 1 T. R. 729.

(*b*) 29 Car. 2, c. 3, s. 4.

which they affix to those terms. The case of *Wain* v. *Warlters* (c), which came before the court of *King's Bench*, arose on the following guarantee: "Messrs. *Wain* and Co., I will engage to pay you by half past 4 this day, fifty-six pounds, and expenses, on bill that amount on Hall." It was objected to this guarantee, on the part of the defendant, that though the promise which was to pay the debt of another was in writing, as required by the statute, yet that the guarantee did not express the consideration on which the promise was given; and they contended, that the consideration as well as the promise was required by the statute to be in writing; and that, for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without consideration, and was consequently void. The court held the objection well founded, and that the word agreement was not to be understood in the loose incorrect sense in which it is sometimes used, as synonimous to a promise or undertaking, but in its more proper and correct sense of a mutual contract on consideration between two or more parties. *Lord Ellenborough* observed, that "it seemed necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been upon a condition precedent, which the party charged might not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absoluse promise which was only a conditional

(c) 5 East, 10.

one: and Mr. *Justice Lawrence*, adverting to the language of the statute, thought that the language used shewed that the word *agreement* was meant to be used in a different sense from *promise*, and that something besides the mere promise was required to be stated.

Shortly after the decision of the case of *Wain* v. *Warlters*, the point which that case had decided came to be considered in the case of ex parte *Minet* (*d*), in the court of *Chancery*, when the *Lord Chancellor* (*Lord Eldon*) expressed the strongest disapprobation of the case of *Wain* v. *Warlters*. "There is a variety of authorities," said his Lordship "directly contradicting the case in the *King's Bench*, which is a most important case in its consequences; for the undertaking of one man for the debt of another does not require a consideration moving between them." And in *ex parte Gardom* (*d*), which came before the same noble and learned Lord soon after, and which was a case arising on the following guarantee, "Whatever cotton twist you may dispose of to Mr. *Thomas Tapp*, we agree and engage to guarantee the payment of the same," his Lordship says, "until the case of *Wain* v. *Warlters* was cited some time ago, I had always taken the law to be clear, that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing; that case has determined two points; first, that a consideration is necessary; secondly, that it must appear upon the writing. It is excessively difficult

(*d*) 14 Ves. 190. (*e*) 15 Ves. 287,8.

to distinguish this from that case; as for this engagement to be answerable for any twist which the petitioners should supply to another person, there is no consideration, unless, as it may be proved by parol evidence, that they did agree to furnish twist. My opinion is, that this is an agreement within the meaning of the statute, to pay for the debt of another person."

It does not appear that the *Lord Chancellor* was aware, at the time of making these observations, of a case which had been decided a few months before in the *King's Bench*, which may be regarded as a commentary and exposition by that court of the case of *Wain* v. *Warlters*, and, it is humbly presumed, may tend, in a great degree, to obviate the objections made by the most learned and eminent person whose observations have been just quoted. It was an action on the following guarantee; "I guarantee the payment of any goods which *J. Stadt* delivers to *J. Nichols*." It was contended, on the authority of *Wain* v. *Warlters*, that this guarantee was not binding on the defendant, as it did not express any consideration for his promise; but *Lord Ellenborough*, before whom the cause was tried, said, that although by the agreement the plaintiff was not obliged to deliver goods, there appeared a sufficient consideration for the defendant's promise to be answerable, if any should be delivered. He should therefore admit evidence of the delivery of the goods. The jury found a verdict for the plaintiff, and the court of *King's Bench* being afterwards moved to enter a nonsuit, refused a rule *nisi*, and confirmed the ruling of the *Chief*

Justice at the trial (*f*). It seems scarcely necessary to observe, that this case is precisely similar to that of *ex parte Gardom*; and therefore, that when the *Lord High Chancellor* conceived his decision of that case to be inconsistent with the case of *Wain* v. *Warlters*, his Lordship must have understood the court of *King's Bench* to have laid down a narrower construction of the statute in *Wain* v. *Warlters*, than they appear from the subsequent case of *Stadt* v. *Lill* to have intended; as there can be no doubt that the Judges of the *King's Bench*, who held the guarantee in *Stadt* v. *Lill* to be valid, would equally have supported that in *ex parte Gardom*. The difference between these two cases and that of *Wain* v. *Warlters* seems to be, that in *Wain* v. *Warlters* nothing is stated on the face of the guarantee but an absolute promise to pay, subject to no contingency, and not shewn to be founded on any consideration either of benefit to the party promising or of loss to the party to whom the promise is made. If nothing more actually took place between the parties than what appears on the face of the guarantee, it was clearly *nudum pactum*; and, putting aside entirely all consideration of the statute of frauds, such an engagement would have been altogether invalid at common law for want of a consideration to support it. Now as the statute requires a note in writing of an agreement of this sort to give it efficacy, is there any thing unreasonable in the Court requiring that the note should include so material a part of the agreement as the consideration by which the party was induced to enter into it, and without which it would have no legal

(*f*) *Stapp* or *Stadt* v. *Lill*, 1 Campb. 242, and 9 East, 348.

operation at all? The two later cases are cases of conditional guarantee, and founded on a sufficient consideration. The party guaranteeing says in effect, "if you will deliver the goods, I will guarantee the payment for them." The delivery of the goods is the consideration of the guarantee, which is in its operation co-extensive with the consideration. Parol evidence would indeed be necessary at the trial, of the fulfilment on the part of the person to whom the guarantee is given, of his part of the contract; by the delivery of the goods; but it was no part of the intention of the authors of the statute of frauds to hinder evidence of this sort being given; their object was to prevent perjury and fraud respecting the terms of the contract, and not respecting the evidence to prove that the contract has been acted on. Nor does there appear to be any particular danger of perjury in these matters. In verbal agreements, of which no other evidence exists than the fleeting recollection of the parties who were present when the engagements were entered into, there is great danger of fraud and perjury when parol testimony is brought forward to sustain them. Against this the statute has wisely provided; and sufficient security is afforded if the consideration of the agreement appear on the face of the written memorandum. Considering then the case of *Stadt* v. *Lill* as an exposition by the court of *King's Bench* of the principle on which *Wain* v. *Warlters* was decided, and as tending to obviate the objections of the *Lord Chancellor* to that case, it seems to stand an uncontradicted authority; nor do the reasonings on which it is founded appear to have been successfully impugned. Two subsequent cases have been decided on the same point. The first came on in the

Exchequer on the following guarantee: "Sir, you will herewith receive back your invoice of nine bags, left on Wednesday, as Mr. Anderton does not now send me his goods to sell; I guarantee all he has bought from you before Tuesday last, but will guarantee no further." The court decided, on the authority of *Wain* v. *Warlters*, that this guarantee was void, as not sufficiently containing the agreement (*g*). In the other case, an action was brought on the following guarantee: "I herewith hand your drafts drawn by Mr. Wallis, and accepted by Mr. Bromley, and indorsed by R. Burns; and should the bills not be honoured when due, I promise to see that they do so." On its being objected that this guarantee did not state any consideration, and therefore was not binding under the authority of *Wain* v. *Warlters*, *Lord Chief Justice Gibbs* said, "It is sufficient. It appears on the face of the letter, that in consideration that the plaintiff would take the notes, the defendant would indemnify him. The consideration therefore is apparent. I do not think it necessary in this case to over-rule the decision in *Wain* v. *Warlters*; I consider this undertaking binding, notwithstanding that case (*h*)."

The reader will observe, that the word *agreement* is not to be found in the 17th section of the statute of frauds, which requires, in relation to contracts for the sale of goods, that "some note or memorandum in writing of the said *bargain* be made and signed *by the parties to be charged* by such contracts, or

(*g*) *Lyon* v. *Lamb*, Fell on Merc. Guar. 228.

(*h*) *Morris* v. *Stacey*, Holt's N. P. Rep. 153.

their agents thereunto lawfully authorized." The following memorandum has been held sufficient by the court of *King's Bench* within the 17th section: "We agree to give Mr. *Egerton* 19*d.* per pound for 30 bales of cotton, customary allowance, cash 3 per cent. as soon as our certificate is complete. (Signed) *Matthews* and *Turnbull*, and dated 2d. Sept. 1803;" and they distinguished this case from *Wain* v. *Warlters*, which turned on the meaning of the word agreement (*i*). Always bearing in mind that the object of the statute of frauds was to prevent fraud and perjury, the distinction taken in these cases seems well founded. Were it not that the counsel engaged in the last-mentioned cause, and the court, seem to have agreed that no consideration was expressed in the memorandum, one might be inclined to think that a sufficient consideration appeared, and that the effect of the writing was that the defendants agreed to give so much per pound for 30 bales of cotton, if the plaintiff should furnish them with it. It is indeed true, that the plaintiff does not undertake to sell the cotton, but that objection would apply equally in *Stadt* v. *Lill*, in which case the consideration of the agreement was held to be well expressed in the memorandum. But, admitting that no consideration is expressed, the effect is precisely the same; and the ruling of the *King's Bench* is by no means calculated to give any facility to those frauds which the statute was intended to prevent; for the memorandum clearly proves the engagement on the part of the defendants to purchase the cotton, if the plaintiff

(*i*) *Egerton* v. *Mathews*, 6 East, 307.

would let them have it; and the plaintiff could not make any use of the memorandum against the defendants without acceding to those terms. The memorandum, therefore, adequately protected *the party to be charged*, and consequently effectuated the intention of the statute. The same observations apply equally to actions brought by the vendee against the vendor for not delivering goods. The memorandum in such case must be signed by the vendor, who is the *person to be charged*, and it will show his assent to the engagement, and the extent to which he has thought proper to bind himself.

Two separate writings may be connected together to form a sufficient note or memorandum within the statute, as a printed bill of parcels delivered by the vendor to the vendee at the time of the sale, and a subsequent letter written and signed by the vendor, and referring to the sale (*k*).

In like manner, an order for goods, written and signed by the agent of the seller in a book of the buyer, but not naming the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller claiming performance of the order, to constitute a complete contract within the statute (*l*). But a memorandum of sale made by the seller's order in his own book, but without any signature, does not take a case out of the statute (*m*).

(*k*) *Saunderson* v. *Jackson*, 2 Bos. & Pul. 238, 3 Esp. 180.

(*l*) *Allen* v. *Bennet*, 3 Taunt. 169; and see *Cooper* v. *Smith*, 15 East, 103.

(*m*) *Cooper* v. *Smith*, 15 East, 103.

By the terms of the statute it will be sufficient if the note or memorandum be signed by an agent of the party to be charged, thereunto lawfully authorized. The following note, "Sold Mr. *George Hankin* 320 quarters of *Hicks*'s malt at 74 shillings," signed by a factor, was held good, by Mr. *Justice Heath*, to charge the buyer, the factor being considered the agent of both parties, though he was paid by the seller and not by the buyer (*n*). But in an action for not delivering goods, the court held that a note made by the purchaser's clerk in a common memorandum-book, and signed by the seller, but in which the name of the purchaser was not mentioned, was insufficient, for it did not appear by the note to whom the goods were sold; and it would have proved a sale to any other person as well as to the plaintiffs (*o*).

With respect to the *signing* required by the statute, it was held, in an action brought by order of the court of *Chancery*, to try the validity of an agreement for the sale of certain premises, that a memorandum produced in evidence by the plaintiff, in the defendant's hand-writing, beginning "I, James Crockford, agree to sell, &c." but not subscribed by him, was sufficient within the statute to charge the defendant (*p*). A bill of parcels, in which the name of the vendor was *printed*, and that of the vendee written by the vendor, was held a sufficient memorandum within the

(*n*) *Hicks* v. *Hankin*, 4 Esp. 114.

(*o*) *Champion* v. *Plummer*, 1 New Rep. 252; and 5 Esp. 240.

(*p*) *Knight* v. *Crockford*, 1 Esp. 190; and see the observations of *Lord Eldon*, in *Saunderson* v. *Jackson*, 2 Bos. & Pul. 238. So a will of lands, beginning "I, John Stanley," need not be otherwise signed. *Lemayne* v. *Stanley*, 3 Lev. 1.

statute to charge the vendor. The court, in giving judgment, laid considerable stress upon the circumstance of the vendor having recognized the printed name by writing the name of the vendee on the bill of parcels (*q*).

A doubt has been suggested by *Lord Mansfield* and Mr. *Justice Wilmot* (*r*), whether *sales by auction* are within the statute of frauds, as the solemnity of that kind of sale precludes perjury as to the fact of sale; and the act seems intended to extend to the mischiefs created by private and clandestine sales. The observations of *Lord Ellenborough*, however, in a later case (*s*), in answer to these objections, seem perfectly conclusive, and clearly to show that such sales are within the statute. "With all deference," says the noble and learned judge, "to these opinions, I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing, in a statute applying to all sales of goods above the value of ten pounds, without exception; merely because the *quantum* of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument, in a degree, applies to all sales in market overt; and if we once get loose from the positive words of the statute, it will become a question only of the *quantum* and degree of danger of perjury in each particular instance; which opens a door to an indefiniteness of construction,

(*q*) *Schneider* v. *Norris*, 2 Ma. & Selw. 286.

(*r*) In *Simon* v. *Metivier*, 1 W. Bla. 601.

(*s*) *Hinde* v. *Whitehouse*, 7 East, 568. See also the observations of Sir *W. Grant*, M. R. in *Blagden* v. *Bradbear*, 12 Ves. 472.

founded on all the varying circumstances of the time and frequency of persons attending the place of sale, and the like, which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world, who are to be governed by it." The case then before the court did not require this point to be settled, and therefore his lordship declared that he would not be understood to give any conclusive opinion upon it. It does not, however, seem probable that any doubt will in future be entertained on the subject.

It has been expressly held by the court of *Common Pleas*, that sales of land by auction are within the 4th section (*t*). Assuming sales by auction to be within the statute, an auctioneer will be considered as an agent for the purchaser as well as for the seller; and his writing down the name of the purchaser, and the price of the goods, is a sufficient note or memorandum within the statute (*u*), to bind the purchaser. A distinction was once made between sales of goods under the 17th section, and of lands under the 4th section; and *Lord Chief Justice Eyre* held, that in a sale of lands the auctioneer was not to be considered as the agent of both parties (*x*); this distinction, however, has since been over-ruled; and it is now considered that the auctioneer is alike the agent for both parties, whether the sale be of lands or

(*t*) *Walker* v. *Constable*, 1 Bos. & Pul. 306. See also *Buckmaster* v. *Harrop*, 13 Ves. 456.

(*u*) *Simon* v. *Metivier*, or *Motivos*, 1 W. Bla. 599. Bull. N. P. 280; and 3 Burr. 1921.

(*x*) *Stansfield* v. *Johnson*, 1 Esp. 101.

goods (*y*). And if the highest bidder at an auction be an agent, and his name be written down by the auctioneer, his principal will be bound (*z*). A broker is also the agent of both parties within the statute (*a*). The agent must, however, be some third person; therefore one of the parties writing a memorandum of the transactions in the presence, and with the approbation, of the other, cannot by so doing be considered as the agent of the other (*b*).

Where goods were sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with the prices opposite the lots purchased by him, in the printed catalogue, and the principal afterwards, in a letter to the agent, recognized the purchase, it was held that the entry in the catalogue, and the letter coupled together, were a sufficient memorandum of the contract within the statute (*c*).

The facts of the case of *Hinde* v. *Whitehouse*, (which has been already referred to) were as follows: sugars, which were in the King's warehouse, under the locks of the King and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of September, when *samples* of half a pound in weight from each hogshead, drawn *after* the sugars had been weighed, and the duties ascertained at the King's beam, were produced to the bidders assembled. At

(*y*) *Emmerson* v. *Heelis*, 2 Taunt. 38.

(*z*) *White* v. *Proctor*, 4 Taunt. 209.

(*a*) *Rucker* v. *Cammeyer*, 1 Esp. 105. *Chapman* v. *Partridge*, 5 Esp. 256.

(*b*) *Wright* v. *Dannah*, 2 Camp. 203.

(*c*) *Phillimore* v. *Barry*, 1 Campb. 513.

the commencement of the sale, the auctioneer, having the catalogue, and also a written paper containing the conditions of sale, in his left hand, at the same time, read the latter paper, as the conditions on which the sale of the sugars mentioned in the catalogue was to proceed, to the company assembled (including one of the defendants), which paper was intitled "conditions of sugar-sale, September 20th, 1805," and which paper he afterwards deposited on his desk under the catalogue, on which catalogue he wrote his minutes of the bidders names and prices; but the two papers were not fastened together. The auctioneer wrote down on the catalogue the names of the defendants as the highest bidders, and the sum bid for the particular lots, having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller; and, after the biddings closed, the samples were delivered to and accepted by the purchaser, according to the usual practice of such sales, as part of his purchase, to make up the quantity marked, as weighed at the King's beam; the court held (assuming sales by auction to be within the statute) that there was not a memorandum of the bargain in this case to take it out of the statute, the writing in the catalogue not being by any reference incorporated with the conditions of the sale, but they held the sale complete, on the ground that the samples, which had been treated as part of the bulk, were to be considered as "part of the goods sold, accepted, and actually received as such by the buyer," within the words of the statute (*d*).

(*d*) *Hinde* v. *Whitehouse*, 7 East, 558.

We have seen that an auctioneer is considered the agent of both parties; but his clerks have not, in general, authority to act as agents for his employers, though they may, as well as others, act as agents, if they are authorized by the principal to do so (*e*). It is clear that, under the 4th and 17th sections of the statute, the agent need not be authorized by writing, as he must in cases falling under the 3d section, which relates to the granting, assigning and surrendering estates, by the express terms of the statute.

Executory contracts, that is to say, contracts which are not intended to be immediately executed, were formerly thought not to be within the statute of frauds.

Thus, in an action brought for the value of a chariot, which the defendant had bespoke of the plaintiff, and when it was made had refused to take, it was held at *Nisi Prius*, by *Lord Chief Justice Pratt*, that it was not a case within the statute of frauds, which, the *Chief Justice* said, related only to contracts for the actual sale of goods, where the buyer was immediately answerable, without time given him by special agreement, and the seller was to deliver the goods immediately (*f*). The same doctrine was adopted by the court of *King's Bench*, in an action brought for the non-delivery of a certain quantity of wheat which the plaintiff had bought of the defendant, and which, at the time of the contract, was unthrashed. *Lord Mansfield*, in delivering his judgment, stated his assent to the law laid down by *Chief Justice Pratt* in the case just stated; and Mr. *Justice Yates* said,

(*e*) *Coles* v. *Trecothick*, 9 Ves. 234.

(*f*) *Towers* v. *Osborne*, Str. 506.

that the statute only related to executed contracts (*g*). And, on another occasion, when the case before the court was clearly within the statute, Mr. *Justice Wilson* said, that where a sale was not immediate, it was not within the statute (*h*). This doctrine has, however, been since rejected, and it is now clearly settled that executory contracts (except in the cases which will presently be specified) are within the statute. In an action on a contract for the purchase of flour to be delivered in sacks, and on board vessels, to be provided by the buyer for that purpose, the court of *Common Pleas* held the contract within the statute of frauds. *Lord Loughborough*, in giving judgment, said, "It is singular that an idea should ever prevail that this section of the statute was only applicable to cases where the bargain was immediate; for it seems plain, from the words made use of, that it was meant to regulate executory as well as other contracts. The words are "*no* contract for the sale of any goods, &c." And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period that the confusion and uncertainty will probably arise which the statute was designed to prevent. The case of *Simon* v. *Metivier* (*i*) was decided on the ground that the auctioneer was the agent as well for the defendant as the plaintiff, and therefore that the contract was sufficiently reduced into writing. The case

(*g*) *Clayton* v. *Andrews*, 4 Burr. 2101.

(*h*) *Alexander* v. *Comber*, 1 H. Bla. 20.

(*i*) Referred to, ante, p. 37, 38.

of *Towers* v. *Sir John Osborne* (*k*) was plainly out of the statute; not because it was an executory contract, as it has been said, but because it was for work and labour to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. In *Clayton* v. *Andrews* (*l*) which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be thrashed before the delivery. This, perhaps, may seem to be a very nice distinction; but still the work to be performed in thrashing, made, though in a small degree, a part of the contract (*m*).

The construction given to the statute in this able and luminous judgment was soon afterwards adopted by the court of *King's Bench* (*n*), when Mr. *Justice Grose*, speaking of the doctrine that executory contracts were not within the statute, said, "If by that were meant contracts for the sale of goods to be executed on a future day, such a construction would be a repeal of the act: but if it only meant such contracts as were incapable of being executed at the time, then the decision was right." In a late case it was held, consistently with the principles laid down above, that a contract for the sale of oak pins, which were not then cut out of the slabs, was not within the statute; and *Lord Ellenborough* said, "the subject matter of this contract did not exist *in rerum natura*; it was incapable of delivery and of part acceptance,

(*k*) Ante, p. 41.
(*l*) Ante, p. 42.
(*m*) *Rondeau* v. *Wyatt*, 2 H. Bl. 63.
(*n*) *Cooper* v. *Elston*, 7 T. R. 14.

and where that is the case, the contract has been considered as not within the statute of frauds. In *Rondeau* v. *Wyatt*, the thing contracted for existed in the very shape and substance in which it was to be delivered; and it was held, that the circumstance of its being to be shipped on board vessels to be provided by the buyer, for exportation, did not take the case out of the statute. And that is very good sense, for if the thing be capable of delivery at the time, why is it not done? but the same reason does not apply where the goods are not deliverable (*o*). But where an additional price was agreed to be paid by the buyer to the seller for goods, on account of the seller undertaking to deliver them to the buyer at a considerable distance from the place of sale, but no separate charge was made for the delivery, the case was held within the statute (*p*).

When goods are sold by a sample, which is part of the bulk, and the sample is delivered to the purchaser, it is a part delivery within the statute (*q*); but it is otherwise, if the sample is not part of the bulk (*r*).

Where goods are ponderous, and incapable of being handed over from one to another, an actual delivery is not necessary, but a symbolical delivery, by the vendor giving the key of the warehouse in which the goods are contained to the vendee, or by delivering other *indicia* of property, will be sufficient within the

(*o*) *Groves* v. *Buck*, 3 Ma. & Selw. 178.

(*p*) *Astey* v. *Emery*, 4 Ma. & Selw. 262.

(*q*) *Klinitz* v. *Surry*, 5 Esp. 267, and see *Hinde* v. *Whitehouse*, 7 East, 564.

(*r*) *Cooper* v. *Elston*, 7 T. R. 14. *Talver* v. *West*, Holt's N. P. R. 179, accord.

statute (*s*). It has also been decided, that a lady writing her name upon some linen, which she purchased at a shop, was sufficient to take the linen out of the statute; but that it did not amount to a delivery of other articles purchased by her at the same time (*t*). And where, in an action for non-delivery of wine, it appeared that the plaintiff went into the defendant's cellar, and selected several pipes of wine, for which he agreed, by parol, to pay a certain price, and the spills or pegs by which the wine is tasted were then cut off, and the plaintiff's initials were marked upon the casks by the defendant's clerk in his presence, and the plaintiff took the gauge-numbers, *Lord Ellenborough* held, that though the delivery of the wine was not completed, so as to bar the plaintiff of his action (which was against the seller for non-delivery of the wine), yet that what had passed amounted to an incipient delivery, sufficient to take the case out of the statute (*u*). And a written order, given by the seller of goods to the buyer, directing a person, in whose care they were, to deliver them to the buyer, which order was afterwards delivered to the warehouseman of the person in whose custody the goods were, has been held a sufficient delivery within the statute (*x*); and it is not necessary that there should be an actual transfer made in the wharfinger's books (*y*). In like manner, when goods are ordered verbally, the delivery of them by the vendor to a

(*s*) *Chaplin* v. *Rogers*, 1 East, 192.

(*t*) *Hodgson* v. *Le Bret*, 1 Campb. 233.

(*u*) *Anderson* v. *Scot*, 1 Campb. 235. n.

(*x*) *Searle* v. *Keeves*, 2 Esp. 598.

(*y*) *Harman* v. *Anderson*, 2 Campb. 243.

carrier is sufficient to bind the contract within the statute, where the purchaser has been accustomed to receive goods from the vendor by the same conveyance (*z*).

And where the purchaser of two horses told the seller, who kept a livery-stable, that as he (the buyer) had neither servant nor stable, the seller must keep them for him; and the seller then removed them out of his sale-stable into another stable, it was held a sufficient delivery of the horses within the statute (*a*). In a very late case, in the *King's Bench*, Mr. *Justice Bayley*, referring to this case of *Elmore* v. *Stone*, says, "that case goes as far as any case ought to go, and I think we ought not to go one step beyond it. I must say, that I doubt the authority of that decision." In that case the defendant had verbally agreed with an agent of the plaintiff for the purchase of twelve bushels of tares (then constituting part of a larger quantity in the plaintiff's possession), to remain in the vendor's possession till called for; and the plaintiff's agent, on his return home, had measured the twelve bushels, and set them apart for the vendee; the court held that this did not amount to an acceptance within the statute; and they distinguished the case from that of *Elmore* v. *Stone*, because in that case an expense had been incurred by the seller on account of the buyer, and by his direction, and that was considered evidence of acceptance on the part of the buyer (*b*).

(*z*) *Hart* v. *Sattley*, 3 Camp. 528.

(*a*) *Elmore* v. *Stone*, 1 Taunt. 458.

(*b*) *Howe* v. *Palmer*, 3 Barn. & Ald. 321.

A. having sent to *B.* a bale of sponge, under a verbal order from the latter, for which he charged eleven shillings a pound, *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined it, and finding it not worth more than six shillings a pound, had sent it back. It was contended by counsel on the part of *A.* the plaintiff, that, although *B.* the defendant had not accepted the bale of sponge without any qualification or right reserved to himself of disputing the quality of the article sent, yet within the meaning of the statute, and with this reserved right of disputing the quality, he had accepted it, as was evidenced by his opening the bale, and subjecting it to the examination of his friends. The court held that the case was not brought within the exception, the *Chief Justice* (*Lord Alvanley*) saying, "how is any judgment to be formed as to the nature of the contract between these parties? Possibly the order was for the best; possibly for the second-best sponge; or sponge of some peculiar quality; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute had in contemplation, and meant to guard against. The only affirmance of any contract to be collected from the evidence is an affirmance of some sort of order for some sort of sponge; and it appears that the moment the article reached the defendant, and was examined, he sent it back to the plaintiff, saying it was not that sort of sponge which he wanted and had ordered. The defendant's letter cannot be construed into any thing like an acceptance, so as to bring this case within the exception which has been relied on. Mr. *Justice Heath* consi-

dered the acceptance required by the statute to be "the ultimate acceptance, and such as completely affirms the contract;" and Mr. *Justice Chambre* added, "certainly there was no acceptance of the goods by the defendant, unless we can consider a refusal to accept as amounting to an acceptance (*c*)".

A. agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon. About the time agreed upon, *A.* rode the horse, and gave directions as to its treatment, &c. but requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away, and to pay the price, to which *B.* assented. The horse died before *A.* took him away, or paid the price. This was held by the court of *King's Bench*, not to be an acceptance of the horse within the statute of frauds (*d*).

We have seen that a part-payment is one of the means of taking a case out of the statute of frauds. It is, however, necessary that the payment should be real; and the mere act of the purchaser drawing a shilling over the hand of the seller, and then returning it into his own pocket, which is called, in the north of *England*, striking off a bargain, is not a part payment (*e*).

Doubts have arisen in the construction of the 17th section of the statute of frauds, whether the subject matter of contracts falling within the opera-

(*c*) *Kent* v. *Huskinson*, 3 Bos. & Pul. 233.

(*d*) *Tempest* v. *Fitzgerald*, 3 Barn. & Ald. 680.

(*e*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597, so stated in the marginal note. The body of the report states the shilling to have been produced by the seller, and returned to his own pocket; but this seems to be a mistake.

tion of that branch of the statute is to be taken at the time of the contract, or at a future time. There are conflicting authorities upon this subject; and it does not appear to be settled at the present day. In a *Nisi Prius* case, which was tried at Guildhall, before *Lord Chief Justice Treby*, a question arose, whether a sale of timber growing upon the land ought, by the statute of frauds, to be in writing, or might be by parole: He was of opinion, that it might be by parole, because it was but a bare chattel; and to that opinion Mr. *Justice Powell* assented (*f*). The report of this case is very short; but it is evident (though it is not so stated), that the question arose on the fourth section of the statute, which respects interests in land; and it is clear, that the same reason which is given against its being within that section of the statute, might be adduced to show that it was within the 17th section, which relates to sales of goods. This case, therefore, is an authority to shew that the 17th section may be applied to a period of time subsequent to that in which the contract is made; for at the time of making the contract the timber was growing on the land, and part of the freehold, and it could not become a chattel till it was severed from the freehold. In a much later case which arose on the stamp-act, 23 Geo. 3, c. 58, s. 1, on a written agreement for the sale of all the hops that should grow upon twenty-two acres of land, to be delivered in pockets at a certain place, the question was, whether the agreement was exempted from the operation of the stamp-act by the

(*f*) Anon. 1 Ld. Raym. 182.

exception which is made in that act respecting agreements for the sale of goods, wares, and merchandise. The Court were unanimous in thinking that the case did not fall within the exemption; but the Judges gave different reasons for their decisions: *Lord Alvanley* stating, that it was an agreement for the sale of goods, wares, and merchandise, and something more; Mr. *Justice Heath*, that the subject matter of the agreement must be taken with reference to the time at which the contract was made, and that at that time the hops did not exist in the state of goods, wares, and merchandise; Mr. *Justice Rooke*, that it was a speculative bargain relative to things not *in esse* at the time when the contract was made; and Mr. *Justice Chambre*, that the contract gave the vendee an interest in the whole produce of that part of the vendor's farm, which consisted of hop-grounds; and that if the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. The learned Judge, however, seemed to differ with Mr. *Justice Heath*, as to the time with reference to which the subject matter of the agreement must be taken; for he says, "I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods, wares, and merchandises at the time of the contract made" (*g*). It will be observed, that though this case was held to be within the stamp-act, it certainly would not, according to the doctrine laid down

(*g*) *Waddington* v. *Bristow*, 2 Bos. & Pul. 452.

in *Clayton* v. *Andrews*, and explained in *Rondeau* v. *Wyatt*, and the other cases mentioned above, have come within the provisions of the 17th section of the statute of frauds, because it was a contract incapable of being executed at the time when it was made. It is quoted here on account of its application to the question, to what time the subject matter of contracts for the sale of goods is to be referred, and on that point we have the authority of Mr. *Justice Heath* opposed to that of *Lord Chief Justice Treby*, Mr. *Justice Powell*, and Mr. *Justice Chambre*. The court of *King's Bench* has since decided that the 17th section does not extend to a contract for a growing crop of grass not severed from the freehold. *Lord Ellenborough* in giving the judgment of the Court, stated his concurrence in the opinion given by Mr. *Justice Heath*, in the last-mentioned case, that the subject matter of these contracts must be taken at the time of the bargain (*h*).

Where the defendant had agreed, by a written contract, to purchase of the plaintiff 300 hogs of bacon, to be delivered at fixed times, and in specified quantities; and after part of the bacon had been delivered, requested the plaintiff, as the sale was dull, not to press the delivery of the residue, to which the plaintiff assented; and on the defendant afterwards refusing to accept the rest of the bacon, the plaintiff brought an action against him for the non-acceptance; and it was objected, that the action

(*h*) *Crosby* v. *Wadsworth*, 6 East, 602. See *Emmerson* v. *Heelis*, 2 Taunt. 38; *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 Mau. & Selw. 205; *Teal* v. *Auty*, 2 Brod. & Bing. 99.

would not lie, for that the alteration of the agreement as to the times of the delivery of the bacon could neither vary the contract (being merely by parole), nor substitute a new one in its place, as it would be void by the statute of frauds, there being neither a part acceptance, nor a part payment under it; the Court held it to be merely a parole dispensation of the terms of the original contract, in respect to the times of the delivery, and therefore that it was not affected by the statute of frauds (*i*).

We will now direct our attention to that part of the fourth section of the statute of frauds which requires a *note or memorandum* "*to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof.*" Great difference of opinion has existed among the Judges on various occasions, with respect to the construction of this clause. In a case which was tried at *Nisi Prius*, before *Lord Chief Justice Holt*, founded on a promise made by the defendant, that if the plaintiff would procure a marriage between the defendant and *A. S.* that the defendant would give him fifty guineas, it was objected, that the promise was not to be performed within a twelve-month, and so void by the statute of frauds; but the *Chief Justice* said, though the promise depended on a contingency which might not happen for a long time, yet if the contingency happen within a year, the case would not be within the statute (*k*); and in another case tried before the same learned Judge,

(*i*) *Cuff* v. *Penn*, 1 Mau. & Selw. 21.

(*k*) *Francam* v. *Foster*, Skinner, 326.

upon an agreement, in which the defendant promised, for one guinea, to give the plaintiff so many at the day of his marriage; and the marriage did not happen within the year; the *Chief Justice* having consulted with all the Judges, a majority of them (against his own opinion) thought that where it did not appear within the agreement, that it was to be performed after the year, a note in writing was not necessary, as the contingency might happen within the year; but where it appeared by the whole tenor of the agreement, that it was to be performed after the year, a note was necessary (*l*): the *Chief Justice* thought that it ought to be in writing, because the design of the statute was not to trust to the memory of witnesses for a longer time than a year (*m*). In consistency with the opinion of the majority of the Judges in this case, a promise to pay money on the return of a ship, though the ship did not in fact return within a year (*n*), and a promise to give a legacy by will, have been held not within the statute (*o*). In the last-mentioned case, Mr. *Justice Denison* says, "The statute of frauds plainly means an agreement not to be performed within the space of a year, and plainly and specifically so agreed. A contingency is not within it; nor any case that depends upon a contingency. It does not extend to cases where the thing *only may* be performed within a year; and the act cannot be extended farther than the words of it." It seems to be quite settled by these decisions, that cases of mere contingency, where

(*l*) *Peter* v. *Compton*, Skinner, 353.

(*m*) 1 Ld. Raym. 317.

(*n*) Anon. 1 Salk. 280.

(*o*) *Fenton* v. *Emblers*, 3 Burr. 1278.

the event contemplated by the parties may or may not take place within a year, are not within the statute. If, however, it appear to be clearly the understanding of the parties, that the agreement will not be performed (which word *performed* means *completed*), within a year, it will be within the statute; though there should be no express stipulation to that effect. Thus, where Messrs. *Boydells* had proposed to publish by subscription a series of prints from scenes in *Shakspere*'s plays, under conditions (stated in their prospectus) that seventy-two scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints, at the price of three guineas a number, two of which were to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; and on the delivery of each number two guineas were to be advanced by the subscribers towards the succeeding number, and that one number at least should be published annually after the delivery of the first, and the proprietors were confident they should be enabled to produce two numbers within the course of a year; Mr. *Drummond* subscribed, and took in the first two numbers, and made his payments according to the conditions stated above; but did not send for any more of the prints afterwards. An action having been brought by Messrs. *Boydells* against Mr. *Drummond*, for not accepting the remainder of the prints, and fulfilling his engagement, the question arose, whether this engagement was within the statute of frauds; and the Court held that it clearly was. *Lord Ellenborough* said, "The whole scope of the undertaking shows

that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet, the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued, that an inchoate performance within a year is sufficient to take a case out of the statute; but the word used in the clause of the statute is *performed*, which, *ex vi termini*, must mean the complete performance or consummation of the work; and that is confirmed by another part of the statute, requiring only part performance of an agreement to supersede the necessity of reducing it to writing; which shows, that when the Legislature used the word *performed*, they meant a complete, and not a partial, performance.—Here, by the very terms of the contract, and clearly in the contemplation of the parties from the whole scope of it, it was not to be performed within a year; for the agreement was to publish at least one number annually after the delivery of the first, and according to the number of pictures to be published, at the rate of two from each play, the work would consist of many numbers" (*p*). It seems, however, that if goods were sold and delivered for a certain price, at thirteen months credit, without writing, the delivery of the goods being a clear execution of the contract on one part, the vendor would be bound by the agreement (*q*).

(*p*) *Boydell* v. *Drummond*, 11 East, 142; *Bracegirdle* v. *Heald*, 1 Barn. & Ald. 722, accord.

(*q*) 11 East, 152; 1 Barn. & Ald. 727.

A doubt has been entertained, whether *a contract for the transfer of stock* is within the 17th section of the statute. In an action for shares in the stock of the Governors and Company of the copper-mines in *England*, the Judges of the *Common Pleas*, and afterwards all the Judges of *England*, were equally divided on the question, whether this was a contract coming within the statute of frauds (*r*). In a subsequent case the plaintiff had agreed with one *Green*, who was the defendant's broker, for 5,000*l.* South Sea Stock, at 187*l.* per cent. to be delivered about ten days after; and at the day appointed, the plaintiff attended at the transfer-office all day with his money, but the defendant never came, and stock having in the mean time considerably risen, the defendant refused to transfer. Thereupon the plaintiff filed a bill in *Chancery* for a specific performance, and the defendant pleaded the statute of frauds. When the case came on before the *Chancellor*, he seemed to be of opinion that the plea was good, and said that it had been held so in many cases. The defendant having, however, barely pleaded the statute, without adding that there was no memorandum in writing of the agreement, the plea was held bad on that account (*s*). In a subsequent case in *Chancery*, where a bill was filed for a specific performance of an agreement for the transfer of some York-building's stock, it became unnecessary ultimately to decide the question, whether the contract

(*r*) *Pickering* v. *Appleby*, Com. 354, and 2 P. Wms. 308.

(*s*) *Mussell* v. *Cooke*, T. 1720, Prec. in Chanc. 533.

was within the statute of frauds, as the case was decided on the ground of the defendant's plea being badly pleaded. The *Chancellor*, adverting to the case of *Pickering* v. *Appleby* (*t*), said, that all the Judges had been equally divided in that case; and that therefore it was too difficult a point for him to decide upon a demurrer. He mentioned, however, the case of one *Wolstenholm*, who had been declared a bankrupt, as having *East India* stock, which had been reversed by an act of parliament, declaring that neither he nor any other person should be liable to bankruptcy, in respect of their having *East India* stock, so that stocks, or the dealing in them, would not make a man liable to bankruptcy; and his Lordship added, nor do they seem to be goods, wares, or merchandises within the intent of the clause (*u*).

The next subject for our consideration will be the operation of the laws which the Legislature has passed from time to time, requiring certain agreements to be stamped. A written instrument, which is directed by these statutes to be stamped, cannot be given in evidence without a stamp; and no parole evidence of its contents is admissible. The various stamp-acts which are to be found in the statute-book closely resemble each other as to the subject we are investigating. They contain clauses exempting memorandums, letters, or agreements, made for or relating to the sale of any goods, wares, or merchandise, from the operation of the statutes. Doubts have often arisen in the courts of law, whether an

(*t*) Cited *ante*, 56.

(*u*) *Colt* v. *Netterville*, 2 P. Wms. 304.

agreement falls within the exemption; and the following cases have been decided on this subject.

Where a broker, on buying goods for his principal, agreed for a half *per cent.* to indemnify him from any loss on the re-sale, though it was objected by the counsel for the broker (in an action brought against him by his principal), that the agreement required a stamp, and did not come within the exemption in the stamp-act, which exemption applied only to contracts relating to the sale of goods, as between vendor and vendee, and could not be taken to extend to others, the Court held, that the agreement, if reduced to writing, did not require a stamp; for though not a contract for the sale of goods, yet it arose out of such contract, and therefore was an agreement *relating to the sale* of them (*x*). And although it was attempted in a subsequent case, brought on a guarantee in writing, to pay for goods thereafter to be purchased by a third person, to set up a distinction between a present and a future sale of goods, and to confine the operation of the exemption to a present sale, that objection was over-ruled by the Court, who adjudged a future sale to be equally within the exemption, the words of the stamp-act being general, and there being nothing to limit them to an immediate sale (*y*).

A class of cases is to be found in the reports, in which agreements have been entered into, partly for the sale of goods, and partly for other purposes; and it seems very difficult to reconcile the decisions which

(*x*) *Curry* v. *Edensor*, 3 T. R. 524.

(*y*) *Warrington* v. *Furbor*, 8 East, 242.

have taken place as to the exemption in the stamp-laws applying to these cases. We have already seen that an agreement for the sale of all the hops which twenty-two acres of land should produce is liable to a stamp (*z*), and that decision seems to rest on a very satisfactory ground—that the agreement gave the purchaser an interest in the whole produce of the twenty-two acres, and to a remedy by action against the vendor if he had grubbed up the hops, or had refused to gather or dry them. In the case of *Buxton* v. *Bedall* (*a*), which came before the court of *King's Bench* some time subsequent to the last-mentioned case, an agreement for the making and putting up of certain machinery in the defendant's house was held to require a stamp, the Court considering it a contract, not for or relating to the sale, but to the making of goods, and for work and labour to be done. It must not, however, be hastily inferred from this decision, that it is in all cases necessary that the goods which are the subject matter of an agreement should be in a completely finished state, and fit for delivery, at the time of the contract, to place it within the exemption of the stamp-laws; for, in the case of *Wilks* v. *Atkinson* (*b*), a contract for the sale and delivery of rape-oil, not yet expressed from the seed in the vendor's possession, was held within the exemption: "the facts are," said *Lord Chief Justice Gibbs*, "that the plaintiff, a great dealer in oil, had this not in oil, but in seed, not then crushed; he enters into an agreement, and as

(*z*) *Waddington* v. *Bristow*, 2 Bos. & Pul. 452.

(*a*) 3 East, 303; see *Ingram* v. *Lee*, post. 63.

(*b*) 6 Taunt. 11.

soon as he has made it, he proceeds to perform it, by crushing the seed, and expressing the oil; and the question is, whether this is a contract relating to the sale of goods, wares, and merchandises. A baker agrees to produce me a loaf to-morrow; he has not the bread, but he has the flour, and is to make it into bread, and deliver it. How often does a butcher contract to deliver meat when he has not the meat, and the beast is not yet killed? It is out of all common sense to say this is not a contract relating to goods, wares, and merchandises." It may be doubted, whether this case, and particularly the illustration of the learned Judge can be quite reconciled with the case of *Buxton* v. *Bedall.* If it be said, that in that case the contract was *as well* for the labour expended in making the machines, as for the machines when made; it cannot be denied that in *Wilks* v. *Atkinson*, part of the engagement of the vendor was for expressing the seed; and it seems difficult to find a satisfactory reason why the labour employed in that way should not be taken into the account as well as in the preceding case. The case of the baker, mentioned by the *Chief Justice* in the way of illustration, seems to come still nearer to that of *Buxton* v. *Bedall*, as there the bread was *to be made.* The only distinction which presents itself is, that in one case the remuneration for the labour performed would amount to a much larger proportion of the price of the goods than in the other. But if that circumstance is to be taken as a criterion, it will be apparently impossible to state, with the necessary distinctness of a rule, what degree of labour employed about any goods which one man engages to furnish to another, shall

be sufficient to take the contract out of the exemption of the stamp-acts. If it should be thought, on account of these difficulties, that the case of *Buxton* v. *Bedall* cannot be reconciled with that of *Wilks* v. *Atkinson*, the last-mentioned decision seems clearly most consistent with the apparent object of the statute (*c*).

In putting a construction upon the clauses of exemption in the stamp-acts, the Courts look to the *primary* object of the agreement; and if the parties had some other object *principally* in view, though the contract may collaterally and incidentally relate to the sale of goods, they will not hold it within the exemption. Thus, a letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods, then in the factor's hands, should remain unsold at the time of the bills falling due, requires to be stamped; for the primary object of the letter was obtaining money upon a pledge of goods; and though it was further intended, that the goods should be sold, and the bills discharged by their proceeds, that was a secondary or collateral object; and the description in the statute is confined to instruments whereof the sale of goods is the primary object (*d*).

Where, after a breach of a contract for the sale and delivery of goods, the parties enter into a fresh agreement in writing to cancel the former agreement,

(*c*) See the observations of Mr. Phillipps on these cases, in his excellent Treatise on Evidence, 463, 4.

(*d*) *Smith* v. *Cator*, 2 Barn. & Ald. 778.

and for the sale of goods upon different terms, the second agreement does not require a stamp (*e*).

An agreement for the sale of goods need not be stamped, though it contain stipulations concerning the time of payment, and other circumstances beside the mere sale of the goods (*f*).

A written agreement, by which *A.* agrees to take one half of the goods purchased by *B.* does not require a stamp (*g*). But an agreement between merchants, that one shall take a share in the outfit of a ship, and in the adventure, is not within the exemption of the stamp-acts (*h*).

By the 23 Geo. 3, c. 58, agreements are required to be stamped, whether the writing be only evidence of the contract, or obligatory upon the parties, from its being a written instrument: and by 32 Geo. 3, c. 51, s. 1, it is provided, that the first-mentioned act "shall not extend to make liable to the said stamp-duty any letter passing by the post between merchants and other persons carrying on trade or commerce in this kingdom, residing at 50 miles distance from each other." It was held by the Court, that a letter written by a son, who managed his mother's trade for her, to a creditor of his mother, containing a promise to pay her debts, which had arisen in the regular course of the trade, came within the above-recited statute, and did not require to be stamped (*i*).

(*e*) *Whitworth* v. *Crotlett*, 2 Stark. 431.

(*f*) *Heron* v. *Granger*, 5 Esp. 269.

(*g*) *Venning* v. *Leckie*, 13 East, 7.

(*h*) *Leigh* v. *Banner*, 1 Esp. 403.

(*i*) *Mackenzie* v. *Banks*, 5 T. R. 176.

An agreement entered into out of England does not require a stamp (*k*).

In an action for not delivering goods made by the defendant for the plaintiff, in pursuance of an order, a memorandum in writing, ordering the goods, but not containing the terms of the contract between the parties, may be read in evidence without a stamp (*l*).

It has been held by Mr. *Justice Lawrence* (*m*) and by *Lord Ellenborough*, that a receipt for a horse containing a warranty of soundness, and having a receipt-stamp but no agreement-stamp, may be received in evidence, as coming within the exemption of the stamp-acts (*n*).

The stamp-act 48 Geo. 3, c. 149, required a stamp on bills of lading of or for any goods, merchandise, or effects to be exported, but not on goods carried coastwise. Goods brought from Berwick to London were exempted, as being carried coastwise (*o*). The last stamp-act, 55 Geo. 3, c. 184, requires the same stamp on bills of lading of goods carried coastwise as on those exported.

The contracts of sale to which our attention has been hitherto directed in this chapter, have nothing inherently illegal in their nature, but are such as might have been entered into at common law without any particular mode of contracting, and without any prescribed formalities. These contracts may still be lawfully engaged in, provided the various enact-

(*k*) *Ximenes* v. *Jaques*, 1 Esp. 311.

(*l*) *Ingram* v. *Lee*, 2 Camp. 521.

(*m*) *Brown* v. *Frye*, 2 Camp. 407.

(*n*) *Skrine* v. *Elmore*, 2 Camp. 407.

(*o*) *Scotland* v. *Wilson*, 5 Taunt. 533.

ments of the statute of frauds, and the stamp-acts which have been enumerated, are duly attended to.

We will now consider those sales which are absolutely and to all purposes illegal and void; either by the principles of the common law, or by the operation of particular statutes.

It is a maxim of the common law, that "*fraud vitiates every thing*," and every contract which could be clearly shown to be fraudulent would have been avoided by the common law. But in order to do away all doubts upon the subject, and for the express purpose of preventing persons defrauding their creditors by fraudulent sales, &c. the statute 13 Eliz. c. 5, was passed (*p*). The preamble of that statute states, that "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been, and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder, or defraud, creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the over-

(*p*) It was the opinion of Lord Mansfield, that the common law was so strong against fraud, that it would have attained every end proposed by this statute and 27 Eliz. c. 4, which was passed for the security of purchasers. Cowp. 434.

throw of all true and plain dealing, bargaining, and chevisance, between man and man, without the which no commonwealth or civil society can be maintained or continued:" and it is declared, by the enacting part of the statute, "that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or to be had or made sithence the beginning of the Queen's majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding." And it is further enacted by the same statute, that "this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made,

conveyed, or assured; which estate or interest is or shall be upon good consideration, and *bonâ fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid, any thing before mentioned to the contrary hereof notwithstanding."

Twyne's case (*q*), which was decided in the *Star-Chamber*, in the 44th year of the reign of Queen Elizabeth, is a leading case on the subject of fraudulent sales of personal property; and the principles there laid down have been recognized and acted upon in many subsequent cases. The facts of that case were as follow: *Pierce* was indebted to *Twyne* in 400 *l.* and was also indebted to *C.* in 200 *l.* *C.* brought an action of debt against *Pierce*, and, pending the writ, *Pierce* being possessed of goods and chattels of the value of 300 *l.*, in secret made a general deed of gift of all his goods and chattels, real and personal whatsoever, to *Twyne*, in satisfaction of his debt; *Pierce*, however, continued in possession of the property, and sold some of it; he sheared the sheep, and marked them with his own mark: afterwards *C.* obtained judgment against *Pierce*, and had a *fieri facias* directed to the sheriff of Southampton, who by virtue of the writ came to make execution on the said goods; but certain persons, by the command of *Twyne*, forcibly resisted the sheriff, claiming the goods as belonging to *Twyne* by force of the said gift; and openly declared, by the commandment of *Twyne*, that

(*q*) 3 Co. 80. S. C. reported under the names of *Chamberlain* v. *Twyne*, in Moore, 638. See Sheppard's Touch. 66.

it was a good gift, and made on a good and lawful consideration. The question on which the Court was called on to decide was, whether the gift was fraudulent, and of none effect, by the stat. 13 Eliz. It was resolved by the whole Court that the gift was fraudulent. The points decided by the Judges in this case, and the observations of Sir *Edward Coke* upon it, form a most valuable commentary on the statute of Elizabeth. The principles of the decision are stated to have been, "1st, That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or any thing of necessity; for it is commonly said, *quod dolus versatur in generalibus.* 2dly, The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them (*r*). 3dly, It was made in secret, *et dona clandestina sunt semper suspiciosa.* 4thly, It was made pending the writ (*s*). 5thly, Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust; and a trust is the cover of fraud. 6thly, The deed contains that the gift was made honestly, truly, and *bonâ fide; et clausulæ inconsuetæ semper inducunt suspicionem.*"

It is also reported to have been resolved by the Court, that, "notwithstanding there was a true debt due to *Twyne*, and a good consideration of the gift, yet it was not within the proviso of the statute, by

(*r*) See 1 Burr. 482.

(*s*) See *Holbird* v. *Anderson*, 5 T.R. 235, post. which shows that a bill of sale will not be deemed fraudulent, merely because it was executed pending an action against the vendor.

which it is provided, that the act shall not extend to any estate or interest in lands, &c. goods or chattels, made on a good consideration and *bonâ fide*; for although it was on a good consideration, yet it was not *bonâ fide*; for no gift should be deemed to be *bonâ fide* within the said proviso which is accompanied with any trust; as, if a man be indebted to five several persons, in the several sums of 20*l.*, and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bonâ fide* within the said proviso; for the proviso saith on a good consideration, and *bonâ fide*; so a good consideration doth not suffice, if it be not also *bonâ fide* (*t*); and therefore, reader," (says the learned reporter,) "when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud: 2dly, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt: 3dly, Immediately after the gift take the possession of them, for continuance of the possession in the donor is a sign of trust. And know, reader, that the said words of the proviso, 'on a good consideration, and *bona fide*,' do

(*t*) See Cowp. 434.

not extend to every gift made *bonâ fide*; and therefore there are two manner of gifts on a goodc onsideration, *scil.* consideration of nature or blood, and a valuable consideration. As to the first, in the case before put, if he who is indebted to five several persons, to each party in 20*l.*, in consideration of natural affection give all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c. which are things of value, the intent of the act was that the consideration in such case should be valuable; for equity requires that such gifts which defeat others should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended that it was made to defeat his creditors."

In an action of trover, brought by the assignees of a bankrupt, the facts appeared to be as follow:—the defendants were bankers, and large creditors of the bankrupt. *Edward Robarts*, the bankrupt, was the brother of *Josiah Robarts*, one of the defendants. *Edward Robarts* bought goods on credit from several tradesmen, who were not aware that he was then in bad circumstances. The defendants employed agents to buy these goods from the bankrupt: *Sweet*, one of their agents, bought goods of *Edward Robarts*, (before his bankruptcy) to a large amount, for which he gave his notes, payable at a future day. These notes were paid in to the defendants, and *Sweet* sold the goods for the use of the defendants, and ac-

counted to them as their agent. The cause was tried before *Lord Mansfield*, who left it to the Jury to say whether it was a fair sale as between the bankers and the bankrupt, or a cheat to defraud innocent persons from whom the goods were bought. The jury considered it no sale, but a void transaction. On a motion for a new trial, in the *King's Bench*, the Court refused to grant it, being clear that the whole was a wicked scheme, concerted between the defendant and the bankrupt, to keep up his credit, to enable him to get goods which were to be employed to satisfy and discharge the debt due to the defendants (*u*).

The case of *Edwards* v. *Harben* (*x*), which was decided in the court of *King's Bench*, was as follows:—*William Tempest Mercer*, being indebted both to the plaintiff and the defendant, on the 27th of *March*, 1786, offered the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at *Lewes*, as a security for his debt. The defendant refused to accept the bill of sale, unless he should be allowed to enter on the effects, and sell them, after the expiration of fourteen days from the execution thereof, in case the debt should not be sooner paid. *Mercer* assented to this proposal, and on the same day executed a bill of sale in the common form, by which he bargained and sold to the defendant, for ever, his household furniture, medicines, stock in trade, (particularly specifying them), and all and

(*u*) *Martin* v. *Pewtress*, 4 Burr. 2477.

(*x*) 2 T. R. 587. See the cases there cited, and see also *Dewy* v. *Bayntun*, 6 East, 257; *Reed* v. *Blades*, 5 Taunt. 212.

every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at *Lewes*. Immediately upon the execution of the bill of sale possession was given to the defendant by the delivery of a cork-screw, in the name of the whole, but in no other manner. All the effects described in the bill of sale remained in the possession of *Mercer* until the time of his death, which happened on the 7th of *April*, 1786. The defendant, on the next day after *Mercer*'s death, which was before the expiration of fourteen days from the execution of the bill of sale, took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same. *Mercer* died intestate, and no letters of administration were taken out to him, either by the defendant or any one else. The plaintiff having sued the defendant as executor *de son tort* of *Mercer*, in an action for goods sold to *Mercer*, the question of the validity of the bill of sale was raised for the consideration of the Court. Mr. *Justice Buller* delivered the opinion of the Court, that there being nothing in the case but an absolute conveyance without possession, that, in point of law, was fraudulent. The learned Judge adverted to a consultation which had taken place among all the Judges respecting another case (*y*), which had been argued before the Court in the preceding term, and stated it to be the unanimous opinion of the Judges, that unless possession accompanies and follows the deed, it is fraudulent and void; and he took a distinction

(*y*) *Bamford* v. *Baron*, 2 T. R. 594, note.

between bills of sale which were to take place immediately, and those which were to take place at some future time, in which latter case, the possession continuing in the vendor till that future time was consistent with the deed, and came within the rule as accompanying and following the deed (*z*). Consistently with the principles thus laid down, it was held, in an earlier case, that where household goods had been conveyed to the trustees of a marriage settlement, together with real estate, the settlement was valid against a judgment obtained by a person who was a creditor of the settlor previously to the execution of the settlement, though no possession of the goods had been given to the trustee, but they had been allowed to remain in possession of the settlor, for that was consistent with the object and intention of the deed (*a*). The case of *Edwards* v. *Harben* has been frequently referred to, and acted upon as good law in subsequent cases; but in a very late case (*b*), *Lord Chief Justice Dallas* stated, that it had been often dissented from; and Mr. *Justice Park* said, that doubts had arisen with respect to the extent of the doctrine there laid down. On the other hand, the case is corroborated by the assent and support of Mr. *Justice Lawrence* (*c*).

But though the want of possession given will vitiate an absolute bill of sale, except in those cases where

(*z*) See the Remarks of Mr. Justice Burnett, in *Ryall* v. *Roll*, 1 Atk. 168.

(*a*) *Cadogan* v. *Kennet*, Cowp. 432. See also *Haslington* v. *Gill*, 2 T. R. 597, and 3 T. R. 620, n.; *Jarman* v. *Woolloton*, 3 T. R. 618.

(*b*) *Steward* v. *Lombe*, 1 Brod & Bingh. 511, 512.

(*c*) 1 Taunt. 382.

such want of possession is consistent with the deed, a different rule has been adopted in the case of a loan. Thus, if *A.* lend *B.* money to purchase goods, and at the same time take a bill of sale of the goods, though *B.* remain in possession, the bill of sale will not, on that account, be fraudulent, but the transaction will be a valid transaction (*d*). And it seems that if *A.* were himself to buy goods, and lend them to *B.* the want of possession in *A.* would not be fraudulent, for it has never been decided that a man may not give the possession of his goods to another (*e*). And where the plaintiff, having purchased a public-house, for which he could not get a license, because he resided in another tavern, put *B.* an insolvent person, into the house as his servant, and supplied him with money to pay for the license which was granted to *B.*, it was held, by the majority of the Judges of the *Common Pleas*, that the sheriff was not authorized to take the goods in the house under an execution against *B.* (*f*).

The object of the statute of *Elizabeth* is the protection of creditors against clandestine and fraudulent alienations of property by their debtors; but it does not apply to the case of a person who was not a creditor, purchasing the goods of another, which had been taken under an execution, and put up to sale by the sheriff, though he suffer the original owner of the goods to remain in possession; there being notoriety in the whole transaction, and the purchase

(*d*) Bull. Ni. Pri. 258; *Meggott* v. *Mills*, 1 Ld. Raym. 286; 2 Bos. & Pul. 60.

(*e*) 3 Taunt. 260. See *Leonard* v. *Baker*, 1 Mau. & Selw. 251.

(*f*) *Dawson* v. *Wood*, 3 Taunt. 256.

being made *bonâ fide*, and without any intention to defeat creditors of their just demands (*g*).

The rule of law, which requires that possession shall accompany or follow the deed, is confined to cases in which the interests of third persons are concerned; but, as between the parties themselves, a bill of sale is good, though no possession is given at the time it is executed (*h*). Therefore, if *A.* make a sale to *B.* a creditor, and afterwards to *C.* another creditor, and deliver possession at the time to neither, and afterwards *C.* get possession, and *B.* take them from him, *C.* cannot maintain trespass, because, though both bills of sale are fraudulent and void against creditors, yet they both bind *A.*, and *B*'s is the elder title (*i*). And a sale without possession given will bind the executor of the party selling after his death; and he cannot resist an action brought by the person to whom the sale is made for the goods (*k*); though (as we have seen) the creditors of the deceased may charge such vendee, when the goods get into his hands, as executor *de son tort*. It seems, also, that a bill of sale without possession given will be good against a creditor, with whose knowledge and assent it was given (*l*).

Where *A.* mortgaged land with a windmill on it, which windmill was not a fixture, and a bargain and sale of the windmill was included in the mortgage, in which the mill was described as being situated

(*g*) *Kidd* v. *Rawlinson*, 2 Bos. & Pul. 59; *Watkins* v. *Birch*, 4 Taunt. 823; *Guthrie* v. *Wood*, 1 Stark. 367. See 5 Taunt. 216.

(*h*) 1 Taunt. 382; Cro. Jac. 271.

(*i*) *Baker* v. *Lloyd*, Bull. Ni. Pri. 258.

(*k*) *Hames* v. *Leader*, Cro. Jac. 270, and Yelv. 196.

(*l*) *Steel* v. *Brown*, 1 Taunt. 381.

upon the land, the Court held, that the windmill could not be taken in execution by a creditor of *A.* though it remained in his possession (*m*). This case is obviously very different from a sale of such goods as may easily be delivered from hand to hand, and may therefore, without inconvenience, be transferred into actual possession. The mortgaged premises remained in the hands of the mortgagor, as is usual in such cases; and the mill continued in his possession also, still standing on the land on which it had been placed.

In the report of *Twyne*'s case in *Moore* (*n*), the two Chief Justices are stated to have said, that if one being indebted to three persons, and having effects to satisfy only one, was sued by one, and made a gift of *all his goods* to the others in satisfaction of their debts, this would be fraudulent against the one who first commenced his suit. But the mere preference of a particular creditor, after the debtor has been sued by another, will not vitiate a bill of sale. Thus, where *A.*, being indebted to *B.* and *C.*, after being sued to execution by *B.*, went to *C.*, and voluntarily gave him a warrant of attorney to confess a judgment, on which judgment was immediately entered, and execution levied on the same day on which *B.* would have been entitled to execution, and on which day *B.* had threatened to sue it out, the preference so given by *A.* to *C.* was held by the Court not to be unlawful, or fraudulent within the statute of *Elizabeth* (*o*). And where a debtor, being in insolvent

(*m*) *Steward* v. *Lombe*, 1 Brod. & Bingh. 506.

(*n*) Moore, 639.

(*o*) *Holbird* v. *Anderson*, 5 T. R. 235.

circumstances, and having been sued by a creditor, pending the suit, and before execution, executed an assignment of all his effects to trustees for the benefit *of all his creditors*, under which assignment possession was immediately taken, it was held, that the assignment was not fraudulent, though made with intent to delay the creditor suing of his execution; for the Court considered it so far from being fraudulent, that it was the most honest act the party could do, arising out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of the creditors (*p.*)

So if a person having several creditors, convey by deed the legal estate, in part of his real and personal property, to a trustee in trust (after deducting the expenses respecting the trust), out of the rents and profits to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, without any intention of fraudulently delaying the creditors not named in the schedule, in obtaining their demands, the deed is good in law (*q*).

It was said in an old case (*r*), by *Lord Chief Justice Coke*, that if a man who has goods of the value of 30*l.* only, be indebted to two men, to one in 20*l.* and to another in 10*l.* and the debtor assign to him to whom he is indebted 10*l.* (*s*), all the goods which

(*p*) *Pickstock* v. *Lyster*, 3 Ma. & Selw. 371; *The King* v. *Watson*, 3 Price, 6, accord. See also *Meux* v. *Howell*, 4 East, 1.

(*q*) *Estwick* v. *Caillaud*, 5 T. Rep. 420.

(*r*) *Wilson* and *Wormal's* case, Godbolt, 161.

(*s*) The words of the Report are, "to him who is in his debt," but the mistake is obvious.

are worth 30*l.* to the intent, that for the residue above the 10*l.* debt he shall be favourable unto him, this assignment is altogether void, because it is fraudulent in part. But Mr. *Justice Foster* said, that it shall not be void for the whole, but only for the surplusage. The doubt whether such an assignment would be wholly or partially avoided, does not seem to have been settled by any subsequent decision. If the creditor were aware of the fraudulent intent of the debtor, it seems most consonant to the general maxim of the common law, that fraud vitiates every thing, as well as to the provisions of the statute of Elizabeth, that the transaction should be completely avoided. If, on the other hand, the creditor were not aware of other debts being due from the debtor, but considered himself as honestly standing in the situation of a trustee for the debtor, as to the excess above what would be sufficient to pay his own debt, it seems most reasonable that the assignment should be held good to the amount of the debt due, and that it should be avoided for the remainder.

In an action tried before *Lord Kenyon*, it appeared that the defendant had succeeded the plaintiff as tenant of a house, and was to take the goods in the house at a valuation; but that not being able to procure the money, she applied to one *Welch*, who agreed with the plaintiff to purchase them for the defendant for a certain price, and took a bill of sale of them to himself, wherein the sum agreed upon was expressed to be the consideration. By a private agreement however, (unknown to *Welch*) the defendant agreed to pay an additional sum to the plaintiff. *Lord Kenyon* ruled, that the

private agreement was void, as a fraud upon *Welch*, who had paid the money in advancement of the defendant, in confidence that the sum paid by him was the whole consideration; and on the case coming before the court of *King's Bench*, the other Judges agreed with his Lordship (*t*).

Where *possession* is necessary to support the validity of a bill of sale, there must be a *bonâ fide* substantial change of possession from the vendor to the vendee; and it seems that the possession of the vendee must be exclusive. Where the household furniture and stock in trade of a debtor, who was a publican, had been assigned to his creditors, and a servant of the assignee was immediately put into the house, but the debtor and his wife continued to carry on the business as usual for several weeks, during which time the servant employed to keep possession, when he sold beer, put the money into the till, to which the debtor and his wife had access, *Lord Ellenborough* held, at *Nisi Prius*, that this was a mere colourable possession, and fraudulent and void against creditors (*u*).

The following facts appeared in a case at *Nisi Prius*: *Sparrow*, a farmer, had borrowed money of the plaintiff, who was his brother-in-law, and the plaintiff had sent his son to *Sparrow*, to obtain from him a bill of sale of all his effects. *Sparrow* executed a bill of sale of all his effects, but not including the lease of his farm; the plaintiff's son took possession of the stock, and continued to reside in *Sparrow*'s house, and employed labourers, &c. *Sparrow*, however, conti-

(*t*) *Jackson* v. *Duchaire*, 3 T. R. 551. See *Cockshott* v. *Bennett*, 2 T. R. 763. *Wells* v. *Girling*, 1 Brod. & Bingh. 447.

(*u*) *Wordall* v. *Smith*, 1 Camp. 332. *Paget* v. *Perchard*, 1 Esp. 205, accord.

nuing to reside in the house, and still appearing to act as master, the servants on the farm not knowing that the plaintiff's son had taken possession, as he gave them orders in *Sparrow*'s name. The goods having been afterwards taken in execution by the sheriff at the suit of a creditor of *Sparrow*, the plaintiff brought an action against the sheriff for the goods: all these circumstances having been left to the jury by *Lord Chief Justice Gibbs*, who tried the cause, they found a verdict for the plaintiff, thereby establishing the validity of the bill of sale; and the court of *Common Pleas* refused to grant a new trial (*x*).

In an action tried at *Guildhall*, before *Lord Chief Justice Holt*, it appeared in evidence, that the father of the plaintiff (who was afterwards executed for robbery and burglary), being in Newgate, and his goods being seized by the defendant, who was sheriff of London, made a bill of sale of the goods for which the action was brought, to the intent to make provision for the plaintiff; the *Chief Justice* held the bill of sale fraudulent; though a sale *bonâ fide*, and for a valuable consideration, would have been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them; yet such a conveyance as that could not be intended for any other purpose but to defraud the king (*y*).

The law will not tolerate fraud in any shape; therefore, in a contract for the sale of a ship, though one term of the contract was that the ship was to be taken "with all faults," yet it was held that the

(*x*) *Benton* v. *Thornhill*, 7 Taunt. 149.

(*y*) *Jones* v. *Ashurst*, Skinn. 357.

vendor could not avail himself of that stipulation, if he knew of any secret defects in the ship, and used means to prevent the purchaser discovering them, or made a fraudulent representation of her condition at the time of the sale (*z*); and where a man agreed to buy a horse of another, giving a barley-corn a nail, and doubling it for every other nail on the horse's hoof, and an action was brought for the price of the horse, the bargain was held void by Mr. *Justice Hyde*, who directed the jury to give the plaintiff the value of the horse as damages (*a*). And where the agent of a vendor of a picture, knowing that the vendee erroneously believed it to be the property of a particular individual, for whom the agent was at that time employed in selling a number of pictures, which belief influenced the vendee's judgment; permitted him to make the purchase without removing the delusion, *Lord Ellenborough*, at *Nisi Prius*, held the sale fraudulent and void (*b*).

A deed of trust, conveying the lease of a farm, and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustees demands upon him, and then to pay all such debts as were justly due from the grantor as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was), as a separate maintenance, in consequence of a separa-

(*z*) *Schneider* v. *Heath*, 3 Campb. 506.

(*a*) *James* v. *Morgan*, 1 Lev. 111; *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164. accord. 6 Mod. 305. S. C. See 1 Wils. 295.

(*b*) *Hill* v. *Gray*, 1 Stark. 434.

tion between her and her husband, is neither fraudulent nor void against creditors, it appearing to have been made *bonâ fide*, and that all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts (*c*).

Proceeding in our investigation, we have next to refer to various statutes by which trading in particular articles is prohibited under a penalty. To enumerate all the prohibitory acts in the statute-book, would enlarge this treatise to an inconvenient size, and would answer no good purpose. It will be sufficient to notice the points which have arisen in the Courts on those statutes. An important question arises here, whether, when a particular contract is prohibited by statute under a penalty, the effect of that prohibition in point of law amounts to an absolute avoidance of the contract. It has been laid down by *Lord Chief Justice Holt* (*d*), that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute. And in a late case (*e*), Sir *James Mansfield, Chief Justice of the Common Pleas*, alluding to an old case (*f*), in which it had been decided that a fair held on a Sunday was good, although by the statute 27 Hen. 6, c. 5, there is a penalty on

(*c*) *Nunn* v. *Wilsmore*, 8 T. R. 521.

(*d*) *Bartlett* v. *Vinor*, Carth. 252. See 1 Taunt. 136.

(*e*) *Drury* v. *Defontaine*, 1 Taunt. 136.

(*f*) *Comyns* v. *Boyer*, Cro. Eliz. 485.

a party who sells on that day, observes, that "the law is since changed; and if any act is forbidden under a penalty, a contract to do it is now held void." And in a late case, which arose in bankruptcy before *Lord Eldon* (g), where the question was, whether a broker of the city of *London* could legally act as a principal in the sale and purchase of goods, he being bound under a penalty, by the regulations of the city, not to trade as a principal, his Lordship said, "the first point of objection resolves itself into this: whether the proposition, that a broker of the city of *London* cannot act as a principal, be founded on a prohibition of general law, or a mere municipal regulation? If on the former, it is quite clear that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted." An action was brought to recover the value of a quantity of bricks sold and delivered by the plaintiff to the defendant; and it was objected at the trial, that the bricks were made of other dimensions than the statute 17 Geo. 3, c. 42, requires; which statute enacts that all bricks made for sale shall be of certain dimensions therein specified; and then gives a penalty, on conviction, for the breach of this regulation; and it appeared that the defendant had selected the bricks. *Lord Ellenborough* held that the action could not be supported; and the Court of *King's Bench* afterwards concurred in his Lordship's opinion; Mr. *Justice Bayley* observing, that "the policy of the act was to protect the buyer against the fraud of the seller, which could

(g) Ex parte *Dyster*, 2 Rose Bankr. Cas. 349. See *Kemble* v. *Atkins*, Holt, N. P. C. 427; & 7 Taunt. 260.

only be done by holding that the latter should not recover the value of such bricks so sold (*h*). But though it is required by stat. 29 Geo. 3, c. 68, s. 70, that every person who shall deal in tobacco shall first take out a license under a penalty, yet the Court of *King's Bench* held that a factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise-office as a dealer in tobacco, or having any license as such, may nevertheless maintain an action against the vendee for the value of the goods sold and delivered (*i*); the Court observing that there was no fraud upon the revenue, nor any clause making the contract illegal; but at most it was the breach of a mere revenue regulation, which was protected by a specific penalty. This case does not, therefore, seem to affect the general principle stated above; inasmuch as the object of the statute was not to prevent the selling of tobacco, but merely to levy a penalty on the unlicensed seller, and the decision of the Court, establishing the legality of the contract, does not tend to prevent the object of the act being attained.

We will now direct our attention to a class of cases in which contracts of sale concerning prohibited goods have come before the Courts. In transactions of this sort, the party selling acts either in immediate contravention of the law by the act of sale, or in aid and furtherance of an intended illegal sale by his vendee, or he is guiltless of any

(*h*) *Law* v. *Hodson*, 11 East, 300, & 2 Campb. 147.

(*i*) *Johnson* v. *Hudson*, 11 East, 180.

participation in an illegal sale either taking place immediately, or contemplated and intended to take place at a future period; but he merely sells the goods, with a knowledge at the time of the sale that the vendee intends to apply them to an illegal purpose. It has been stated by the late learned *Chief Justice of the Common Pleas*, Sir *James Mansfield*, that the merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction (*k*). The decided cases will, in general, be found consistent with this principle.

Thus, where the plaintiff, residing at *Dunkirk*, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled into England, but the plaintiff had no concern in the smuggling himself, it was held by the Court of *King's Bench* that this was a legal contract, and that an action might be supported on it (*l*). *Lord Mansfield*, in giving judgment, lays it down, that if the goods are sold to be delivered in England, where they are prohibited, the contract is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the state if such an action could be maintained. In a subsequent case, the defendant, who lived in *Cornwall*, sent an order to one of the plaintiffs, residing in *Guernsey*, who was a partner with three other plain-

(*k*) 5 Taunt. 182. Cowp. 341. *Hodgson* v. *Temple*, 5 Taunt. 182, accord.
(*l*) *Holman* v. *Johnson*,

tiffs, all living in England, for some brandy, which he directed to be delivered to the captain of a smuggling vessel, and some of the brandy was delivered at *Guernsey*, and the rest at sea; the whole being put by the partner at *Guernsey* into half-ankers, and ready slung for the purpose of smuggling, but it was brought into *England* at the risk of the defendant; the Court held that the action could not be supported (*m*). And where the consideration for bills of exchange, was certain ankers of brandy and gin shipped by the plaintiff, and delivered on board a ship by the defendant's order, it was held by the Court that the plaintiff could not recover on the bills (*n*). Also, where the defendant, an Englishman, living in *England*, contracted with the plaintiff, a foreigner, living at Lisle, for a quantity of lace which the plaintiff knew was to be smuggled into *England*, and the plaintiff for that purpose had it packed in a particular manner by the direction of the defendant, for the more easy conveyance of it into *England* without a discovery, the Court held that the contract was void, and that the plaintiff could not recover the value of the goods (*o*).

By statute 7 Geo. 1. st. 1, c. 21, s. 2, all contracts made by his Majesty's subjects for loading any ship in the service of foreigners, with a cargo to trade to the *East Indies*, are declared void. To an action of debt on a bond, the defendant pleaded that it had been unlawfully agreed between the plaintiffs and the defendant, that the plaintiffs should sell and deliver

(*m*) *Biggs* v. *Lawrence*, 3 T. R. 454.

(*n*) *Clugas* v. *Penaluna*, 4 T. R. 466.

(*o*) *Waymell* v. *Reed*, 5 T. R. 599.

to the defendant certain goods to be shipped by the defendant in *London*, to be carried to *Ostend*, and there to be shipped on board other vessels to the *East Indies*. A verdict having been found for the defendant on this issue, a rule *Nisi* was obtained in the Court of *Common Pleas*, to enter judgment for the plaintiff, notwithstanding the verdict found for the defendant. After the case had been fully discussed at the bar the Court discharged the rule, *Lord Chief Justice Eyre* saying that the plaintiffs had not merely assisted, but that they must be taken to be principals in the transaction, which brought the case directly within the act of parliament (*p*).

A late case may perhaps be thought to go a little further than any of the decisions above enumerated. In that case the goods for which the action was brought had been sold by a druggist to a brewer, the seller knowing at the time of the sale that they were to be used in the brewery. The goods consisted of *Spanish* juice, isinglass, ginger, and other articles, the use of which by brewers, is contrary to the provisions of 42 Geo. 3, c. 38, by which they are prohibited from using any thing but malt and hops in the brewing of beer. The Court held, that the action could not be sustained (*q*). This case certainly seems to resemble that of *Holman* v. *Johnson* more nearly than any subsequent case, and there is, perhaps, some difficulty in distinguishing between them. In *Holman* v. *Johnson*, the vendor was aware of the illegal purpose to which the goods were to be applied

(*p*) *Lightfoot* v. *Tenant*, 1 Bos. & Pul. 551.

(*q*) *Langton* v. *Hughes*, 1 Mau. & Selw. 593.

by the vendee; and in *Langton* v. *Hughes*, it does not appear that the vendor was in any other way implicated in the transaction than by knowing that the drugs were to be illegally used by the defendant in brewing beer. The attention of the Court was not called to the case of *Holman* v. *Johnson*, which was not mentioned in the argument. There is, however, one distinction between the cases, founded on the particular object of the 42 Geo. 3, which was the protection of the public health, as well as of the revenue; and it was observed by *Lord Ellenborough*, in delivering his judgment, that there is a distinct prohibition in the act against causing or procuring any ingredients to be used except malt and hops; and "a person," says his Lordship, "who sells drugs with a knowledge that they are meant to be mixed, may be said to cause or procure, *quantum in illo*, the drugs to be mixed."

It is illegal to sell corn by any other measure than the *Winchester* bushel (*r*).

Sales made by persons in their ordinary calling on a *Sunday* are avoided by the statute 29 Car. 2, c. 7; but a sale of goods on a *Sunday*, which is not made by the vendor in his ordinary calling, is not void either by that statute or at common law (*s*).

By statute 1 & 2 Phil. & Mar. c. 7, s. 2, persons living in the country, out of any city, borough, town corporate, or market-town, are forbidden, under a penalty, to sell by retail, "any woollen cloth, linen cloth, haberdashery wares, grocery wares, or mercery

(*r*) 22 Car. 2, c. 8, s. 2; 22 & 23 Car. 2, c. 12, s. 2. *The King* v. *Major*, 4 T. R. 750.

(*s*) *Drury* v. *Defontaine*, 1 Taunt. 131.

wares, (except cloth of their own making,) at or within any city, borough, town corporate, or market-town, or within the limits or suburbs thereof." This act only extends to persons living in the country; and the inhabitants of one city, borough, &c. may lawfully sell woollen cloth, &c. by retail in other cities, boroughs, &c. (*t*).

By 5 & 6 Edw. 6, c. 19, "If any person exchange any coined gold, coined silver, or money, giving, receiving, or paying any more in value, benefit, profit, or advantage for it, than the same is or shall be declared by the king's proclamation to be current for within this his highness's realm, and other his dominions, then all the said coined gold, silver, and money so exchanged, and every part and parcel thereof, shall be forfeited, and the party so offending shall suffer imprisonment, &c." A person was indicted under this statute for exchanging guineas for bank-notes, rating the guineas in such exchange at a higher value than they were current for by the king's proclamation. This case, and another which was similar in its circumstances, were argued several times before all the Judges in the *Exchequer Chamber*; and the result was, that the facts charged in the indictment were adjudged not to be an offence within the act (*l*).

By 7 & 8 Wil. 3, c. 4, candidates at elections are prohibited from giving away provisions to any voter after the *teste* of the writ, *in order* to be elected. An innkeeper cannot recover against a candidate for pro-

(*t*) *Davis* v. *Leving*, 2 Lev. 89; *Lee* v. *White*, Dougl. 256.

(*u*) *The King* v. *De Yonge*, and *The King* v. *Wright*, 14 East, 402.

visions so furnished at his request (*x*). Non-resident voters are equally within the meaning of the act as resident (*y*).

By 24 Geo. 2, c. 40, s. 12, it is enacted, that "no person shall maintain any action for any spirituous liquor unless such debt shall have been *bonâ fide*, contracted at one time to the amount of twenty shillings or upwards." An action was brought by a liquor-merchant, of whom the defendant had taken one side of a house, the other side being occupied by an agent, who sold liquors on account of the plaintiff. The defendant kept an eating-house, and the liquors consumed by the customers there were furnished by the plaintiff's agent. The action was brought for these liquors, and many items in the bill were under the amount of twenty shillings. It was objected on the part of the defendant, that he was not bound to pay for these items, which were furnished directly in the teeth of the act of parliament. *Lord Kenyon*, however, thought that the case did not fall within the mischiefs intended to be remedied by the act, the intent of which was to prohibit the sale of such small quantities to the *consumer*. This was done for the purpose of preventing the pernicious effects of dram-drinking, which had been found extremely pernicious to the lower orders of society. In the present case, the liquors were not sold to the defendant for his own consumption, but for the use of the guests resorting to his house in the way of his trade; and

(*x*) *Ribbans* v. *Crickett*, 1 Bos. & Pul. 264.

(*y*) *Lofhouse* v. *Wharton*, 1 Campb. 550.

therefore, in his Lordship's opinion, the case was not within the act of parliament (*z*).

Selling game is prohibited by 5 Anne, c. 14, 28 Geo. 2, c. 12, and 58 Geo. 3, c. 75.

By 7 Geo. 2, c. 8, (made perpetual by 10 Geo. 2, c. 8), it is enacted, (s. 6,) "that no person who shall sell any public or joint-stock, or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person to sell such stock or other securities, which shall be so refused, or neglected to be paid for, to any other person for the best price which can be obtained; and after such sale to receive (if the parties can agree), or to recover, from the person who first contracted for the same, all the damage which shall be sustained thereby; and (s. 7,) that it shall be lawful for any person who shall buy any public or joint stock, or other public securities, to be accepted and paid for on a future day, and which shall be refused or neglected to be transferred, to buy the like quantity of such stock, or other public securities of any other person, at the current market price, and to recover and receive, after such purchase and acceptance (if the parties can agree), from the person or persons who first contracted to sell or deliver the same, the damage which shall be sustained by reason of the not delivering or not transferring such stock or other securities; and

(*z*) *Jackson* v. *Attrill*, Peake, 180, a.

(s. 8,) that all contracts and agreements whatsoever, made or entered into for the buying, selling, assigning, or transferring of any public or joint-stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not at the time of making such contract or agreement be actually possessed of, or entitled unto, in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee, or trustees, to their use, shall be null and void to all intents and purposes whatsoever; (s. 11,) provided that nothing in this act contained shall extend or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint-stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement being made and entered into for the re-delivering, assigning, or transferring such public or joint-stock, or other public securities, or any part, share, or interest therein, upon the re-payment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest." A case in which the plaintiff, being possessed of 3,000*l.* four *per-cent.* stock, empowered the defendant to sell the same for his own benefit, in consideration of which the defendant agreed to transfer at

the next opening 3,000*l.* four *per-cent.* into the plaintiff's name, was held by the Court of *King's Bench* not to be within the statute; but to be a loan of stock, and an undertaking to replace it, which the Legislature did not intend to prohibit (*a*). *Omnium* is stock within the meaning of the statute (*b*); but lottery tickets have been held not to be "public securities" within the act (*c*).

We have already seen, in the first chapter of this work, that an alien enemy lies under a disability to sue in our courts; we will now direct our attention more at large to the subject of trading with an enemy during war, which is in general illegal; and the particular manner and circumstances by which such trading may be legalized. Whatever doubts may have been formerly entertained, it is now fully settled, that all trading with an enemy in time of war, without the king's license, is illegal. This was decided in the case of *Potts* v. *Bell* (*d*), which was an action on a policy of insurance, and in which the judgment of the Court of *Common Pleas* was over-ruled by the *King's Bench* on a writ of error. The decision of the Court of *King's Bench* was made after considering the cases which had been previously decided at the *Admiralty*, and at the *Cockpit*, and seems to have settled the question. The king may at common law license such trade, either generally, or in a qualified manner; and if he grant such license, subject to any qualifications, the party seeking to

(*a*) *Sanders* v. *Kentish*, 8 T. Rep. 162. See *Shepherd* v. *Johnson*, 2 East, 211; *Maddock* v. *Rumball*, 8 East, 304; *Tate* v. *Wellings*, 3 T. R. 531.

(*b*) *Brown* v. *Turner*, 2 Esp. 631; *Olivierson* v. *Coles*, 1 Stark. 496.

(*c*) *Mortimer* v. *Salkeld*, 4 Campb. 42.

(*d*) 8 T. Rep. 548. See *Willison* v. *Patteson*, 7 Taunt. 439.

protect himself under it must conform to the requisitions of it; as, if it be provided in the license that the party acting under it shall give bond for the due exportation to the places proposed, of the goods intended to be exported, and they are exported without such bond being given, the exportation is illegal (*e*).

The very peculiar state of the commerce of this country during the late war, occasioned by the necessity felt by our government to counteract the efforts of *France* to deprive us of all commercial intercourse with the continent of *Europe*, introduced the practice of granting licenses to trade to a great extent; and as the foreign commerce of the country could be carried on in no other way than under the protection of those licenses, the Courts of Law gave a large and liberal construction to them for the purpose of effecting the object which they were intended to attain. As therefore the cases which were determined on this subject during the war were often decided by the authority of particular acts of parliament, and on orders of council, and licenses authorized by those statutes, and granted under their authority; and as there is no probability that so anomalous a state of things will ever again exist in the commercial world, it is not intended to crowd the pages of this work with all the decisions which took place at that time, but such only will be selected as appear likely to be useful hereafter in the way of authority and precedent (*f*).

(*e*) *Vandyck* v. *Whitmore*, 1 East, 475.

(*f*) The following cases may be consulted by those who are disposed to investigate the subject fully: *Fenton* v. *Pearson*, 15 East, 419; *Mennett* v. *Bonham*, 15 East, 477; *Flindt*

The following cases have been decided with respect to the person to whom the license to trade extends:

The statute 43 Geo. 3, c. 153, s. 16, authorized the king, by order in council, to permit, during the continuance of hostilities, the importation of any such goods as should be specified in such order in council, from any port or place of the enemy, in neutral ships. *Merac* & Co. who were the correspondents of *Gordon* & Co. then residing in *France*, in contemplation of a license, to be procured under the authority of this act, contracted with *Timson* & Co. for the supply of a quantity of brandy by *Gordon* & Co. on certain terms, and *Merac* & Co. guaranteed to *Timson* & Co. the shipment of the brandy by *Gordon* & Co. from *France*, on account of *Timson* & Co. on the terms agreed upon. A license was then obtained for "*Merac* & Co. and other *British* merchants" to import the brandy in an *American* ship, being, as it was stated, "the property of the said person or persons, or some of them, as may be specified in their bill of lading." In an action by *Timson* & Co. against *Merac* & Co. on this guarantee, it was contended, on the part of the defendants, that this was only a license to *Merac* & Co. to trade, and that they having no

v. *Scott*, 15 East, 525, and 5 Taunt. 674; *Flindt* v. *Crokatt*, 15 East, 522, and 5 Taunt. 674; *Feise* v. *Bell*, 4 Taunt. 4; *De Tastet* v. *Taylor*, 4 Taunt. 233; *Anthony* v. *Moline*, 5 Taunt. 711; *Schnakoneg* v. *Andrews*, 5 Taunt. 716; *Robinson* v. *Morris*, 5 Taunt. 720; *Staniforth* v. *Coombe*, 5 Taunt. 726; *Bazett* v. *Meyer*, 5 Taunt. 824; *Robinson* v. *Touray*, 1 Mau. & Selw. 217; *Hagedorn* v. *Reid*, 1 Mau. & Selw. 567; *Hagedorn* v. *Bazett*, 2 Mau. & Selw. 100; *Hullman* v. *Whitmore*, 3 Mau. & Selw. 337; *Grigg* v. *Scott*, 4 Campb. 339; *Rucker* v. *Ansley*, 5 Mau. & Selw. 25; *Everth* v. *Tunno*, 1 Barn. & Ald. 142.

property in the goods, the owners were not properly described as required in the license, which was therefore void; the Court, however, held, that neither the act of parliament, nor the license, required the owners of the property to be individually named; and that even if the license were to be so construed, as it only required the goods imported to be the property of "the said persons or some of them, as may be specified in their bills of lading," and as no bills of lading were made out which might have been made out to *Merac* & Co. and would have conveyed the property in the goods to them, that they were liable to answer in damages upon their guarantee (*g*).

A license having been obtained from the *British* government by *A.* to import from an enemy's country, in six ships, such goods as should be specified in his bills of lading, and the goods having been imported on board one of the six ships on account of *B. C.* & *D.* to whom several bills of lading were sent for their respective goods, and one general bill of lading for the whole cargo was sent to *A.*, the Court held that the whole cargo was protected by the general bill of lading (*h*). But a license from the king to a particular individual to import, on board of neutral ships, from an enemy's country, goods being his property, cannot be assigned so as to authorzie the importation of goods the property of the assignee (*i*). And it makes no difference that a general bill of lading is signed to the individual to whom the license

(*g*) *Timson* v. *Merac*, 9 East, 35.

(*h*) *Defflis* v. *Parry*, 3 Bos. & Pul. 3.

(*i*) *Felze* v. *Thompson*, 1 Taunt. 121.

was granted, the license clearly being intended only to protect goods which were his property (*k*).

A license to export goods, granted to *H. N.* on behalf of himself and other *British* merchants, is sufficient to legalize an insurance on such adventure, if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the license, though he had no property in the goods himself (*l*).

Under a license to *British* brokers resident here, that a ship bearing any flag may import from an enemy's country, to whomsoever the property may appear to belong, three *British* subjects, not named in the license, one of whom resides in a foreign country, may import from another hostile country to this: and the agent who effected a policy of insurance may recover in trust for three *British* partners, one of whom at the time of the action resides in a foreign country (*m*). And a license to a *British* subject, permitting a vessel bearing any flag except the *French*, to proceed to a hostile port, and bring home a cargo of goods, to whomsoever such property may appear to belong, authorizes the importation of such goods, being the property of an alien enemy subject of that hostile country (*n*).

But where a general license was given to *R. S.* and other *British* merchants, the Court held that another *British* merchant must, in order to avail himself of the protection of the license, give probable

(*k*) *Feise* v. *Waters*, 2 Taunt. 248.

(*l*) *Rawlinson* v. *Janson*, 12 East, 223.

(*m*) *Fayle* v. *Bourdillon*, 3 Taunt. 546. See *Feise* v. *Bell*, 4 Taunt. 4.

(*n*) *Morgan* v. *Oswald*, 3 Taunt. 554.

evidence to account for his possession of it, and to connect his adventure with the general license (*o*). A license to trade with an enemy, granted to *F.* & *Co.* and others, may be used by the person for whom *F.* & *Co.* were the acting agents in procuring such license, and in carrying on the adventure, though the principal be a foreigner residing here under an alien license at the time (*p*).

A wrong description of the person to whom a license is granted invalidates it; as, where he was described to be of "*London*, merchant," whereas he was in fact resident at *Heligoland*, though he intended to come and settle in *London* (*q*).

In a case which came before the court of *Admiralty*, it was held by *Sir William Scott*, that a license granted to Mr. *Ravie*, of *Birmingham*, "for the importation of certain goods from *Holland* into this country, would not protect a shipment made by Mr. *Ravie* in person in *Holland*, and under papers describing the firm of his house as "*Ravie* & *Co.* of *Amsterdam*." "Am I at liberty," said the learned Judge, "to say that this is a transaction which comes fairly within the terms of the license, or that it is lawful for any individual to ingraft the character of a *Dutch* exporter, on a license granted to him as a *British* merchant, to import? If it could be shown that there was any necessity, or any consideration of policy, that required such an indulgence, the proper

(*o*) *Barlow* v. *M'Intosh*, 12 East, 311. *Busk* v. *Bell*, 16 East, 3. accord. *Robinson* v. *Morris*, 5 Taunt. 720, accord. See *Warin* v. *Scott*, 4 Taunt. 605.

(*p*) *Feise* v. *Newnham*, 16 East, 197.

(*q*) *Klingender* v. *Bond*, 14 East, 484.

mode would be, that it should be presented to the view of Government at the time when the license is obtained, and then permission to that extent might beinserted in the terms of the license itself. Without such a declaration of the intention of Government, for this Court to apply the license to the protection of such a transaction as this, would be, I think, to carry it far beyond the fair construction which the terms of the grant will bear (*r*)."

With respect to the time during which the license is to continue in force, the following cases may demand attention.

If a license to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods are shipped before the time expires; but it is necessary that the ship should sail before that time to legalize the voyage (*s*). And where a license for a voyage to a hostile country was to continue in force for exporting till the 10th of September, and the ship sailed from the Custom-house in *London* on the 9th of September, but did not receive her clearing-note at *Gravesend* (where the clearing-note is usually received) till the 12th, the Court held, that passing the Custom-house was not an exportation, and consequently that the ship had not exported the cargo till after the license had expired (*t*).

Where a license was granted for a voyage to a hostile country, to continue in force till the 29th of

(*r*) *Jonge Klassina, Bol.* 5 Rob. Ad. Rep. 297. 300.

(*s*) *Vandyck* v. *Whitmore*, 1 East, 475.

(*t*) *Williams* v. *Marshall*, 6 Taunt. 390, & 7 Taunt. 468. See the *Attorney-General* v. *Pougett*, 2 Price, 381. *Tulloch* v. *Boyd*, 7 Taunt. 472.

September, and the voyage having commenced before that day, the ship was detained beyond the day by contrary winds, the license was nevertheless held to protect the whole voyage (*u*). And where a license had been obtained to remain in force till the 29th of September, and a policy of insurance had been effected "at and from *Archangel* to *London*," and the ship had her cargo on board, and was ready to sail before that day, but was prevented by contrary winds, the license was held to protect the voyage (*x*). The learned Judge of the Court of *Admiralty*, *Sir William Scott*, has laid down the following rule upon this subject: "Where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the license into literal execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled (*y*)."

It belongs to the government of this country to determine in what relation of peace or war any other country stands towards us; and where the king declared, by orders in council, certain ports in the island of *St. Domingo* not hostile, which had formerly been in the possession and under the

(*u*) *Groning* v. *Crockett*, 3 Campb. 83.

(*x*) *Schroeder* v. *Vaux*, 3 Campb. 84. 15 East, 52, S. C. See *Freeland* v. *Walker*, 4 Taunt. 478. *Leevin* v. *Cormac*, 4 Taunt. 483. *Siffkin* v. *Glover*, 4 Taunt. 717. *Siffken* v. *Allnutt*, 1 Ma. & Selw. 39. *Effurth* v. *Smith*, 5 Taunt. 329.

(*y*) *Gode Hoop*, *Pieters*, Edwards's Cases on Licenses, quoted 3 Campb. 84, 5.

dominion of the French, but were no longer so, the Court held a trading to such ports to be legalized (*z*).

The practices called *forestalling*, *regrating*, and *engrossing*, are treated by the law as offences against public trade, and are on that account illegal. *Forestalling* was described by the statutes 5 & 6 Edw. 6, c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the prices there: *regrating* to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place: and *engrossing* the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again.

This statute has been repealed by 12 Geo. 3, c. 71, but forestalling, regrating, and engrossing, are still offences by the common law. It has been decided that selling corn in sheaves is illegal (*a*); but a sale of growing crops of corn, or of hops, is not contrary to law (*b*). As the law upon this subject has become almost obsolete, and we seldom hear of any proceedings in the Courts respecting forestalling, regrating, or engrossing, we will merely refer in the margin to the books which treat on the

(*z*) *Blackburne* v. *Thompson*, 15 East, 81. 3 Camp. 61. S. C. *Johnson* v. *Greaves*, 2 Taunt. 344. accord. See *Hagedorn* v. *Bell*, 1 Ma. and Selw. 450. ante, 20.

(*a*) *Hadham's* Case, 3 Inst. 197.

(*b*) *Bristow* v. *Waddington*, 2 New Rep. 355.

subject, and then dismiss it from our further consideration (*c*).

All contracts of sale which are of an immoral nature are void in law. Thus it has been held, that a print-seller could not recover the price of caricatures of an immoral, obscene, or libellous tendency, which he sent to a customer who had given a general order for all the caricature prints that had ever been published (*d*). And if a tradesman sell clothes to a prostitute, for the purpose of enabling her to carry on her prostitution, and expect to be paid from the profits of it, such a contract is illegal, and cannot be enforced in a Court of Justice; but a mere knowledge of the prostitute's way of life will not prevent the tradesman from recovering (*e*).

Though in general a party can only transfer that right or interest in a thing to another which he himself possesses, yet the law, for the security of purchasers, who can in general have no means of ascertaining the property of the seller in the thing offered for sale, has allowed some sales which are made publicly and with notoriety to be valid, though the party selling has no property in the commodities sold. The general rule of law, in these cases, is that all sales in market *overt* shall be good, not only between the parties, but as to all other persons. Market *overt*, or open market, is held in the country on particular days, and at particular times, in pursuance of charters or prescriptions; but in *London*,

(*c*) 3 Inst. 195. *Rose* v. *Maynard*. Cro. Car. 231. 1 Hawk. P. C. c. 80. 4 Bla. Com. 158. *Rex* v. *Waddington*, 1 East, 142, 167.

(*d*) *Fores* v. *Johnes*, 4 Esp. 97.

(*e*) *Bowry* v. *Bennet*, 1 Campb. 348, and see the Cases quoted in the note on that case.

every day except *Sunday* is market-day, and every shop in which goods are publicly exposed to sale is market overt for such goods as the owner professes to trade in. But if a man's goods are stolen from him, and sold out of market overt, his property is not altered, and he may take them wherever he finds them. And by the statute 1 Jac. 1, c. 21, the sale of any goods wrongfully taken, to any pawn-broker in *London*, or within two miles thereof, shall not alter the property. Even sales in market overt will not bind the king; and if goods be stolen by a common person, and then taken by the king's officer from the felon and sold in market overt, if the owner have used proper diligence in convicting the offender, he will not lose his property in the goods. And if the buyer know the property not to be in the seller, or there be any fraud in the transaction, if he know the seller to be an infant, or *feme covert* not usually trading for herself, or if the sale be not originally or wholly made in the fair or market, or not at the usual hours, the owner's property is not bound by it. If a man buy his own goods in a fair or market, the contract of sale shall not oblige him to pay the price, unless the property has been altered by a previous sale; and notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into the possession of the goods, the original owner may take them when found in his hands (*f*). The *Strand* is not market overt (*g*). The owner of stolen goods prosecuting the felon to conviction is entitled to a restitution of his goods; but he cannot recover their value in an action of

(*f*) 2 Bla. Com. 449, 450. (*g*) 12 Mod. 521.

trover against a person who purchased them in market overt, and sold them again before the attainder, though the original owner gave him notice of the robbery while the goods were in his possession (*h*). A wharf is not a market overt; and where the owner of goods sends them to a wharf where goods of the same sort are usually sold, and the wharfinger sells them without authority, no property passes to the vendee (*i*).

Sales in market overt by a stranger will bind an infant, or feme covert, having interest in the goods, either in their own right, or as executor or administrator; and it will also bind idiots, persons insane, beyond the sea, or in prison, except in the cases stated above.

There are many exceptions to the general rule respecting sales in market overt. Thus, the sale must be made in an open place, and not in a back-room, or warehouse; also it must be in a proper place for the sale of the particular goods; thus, the sale of plate in a scrivener's shop would not be valid; and it must be a sale for a valuable consideration, and not a gift (*k*).

By the statutes 2 & 3 Phil. & Mar. c. 7, and 31 Eliz. c. 12, a purchaser of a stolen horse in a fair or market overt gains no property in the horse unless he shall be openly exposed in the time of such fair or market for one whole hour together, between ten in the morn-

(*h*) *Horwood* v. *Smith*, 2 T. Rep. 750. But he is not entitled to restitution where goods are obtained by fraud, and then pawned to a third person, *Parker* v. *Patrick*, 5 T. Rep. 175.

(*i*) *Wilkinson* v. *King*, 2 Campb. 335.

(*k*) 2 Inst. 713; Case of Market Overt, 5 Co. 83 b.

ing and sunset, in the public place used for such sale, and not in any private yard or stable, and afterwards he be brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be paid, if any be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen, he put in his claim before some magistrate where the horse shall be found; and within forty days more prove such horse his property by the oath of two witnesses, and tender to the person in possession such price as he *bonâ fide* paid for him in market overt. And in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize his horse, or bring an action for him (*l*).

It was once decided, that the vendor entering a wrong name in the book of the market, would not invalidate the sale of a horse in market overt within this statute (*m*); but that decision has been since over-ruled, and it seems now to be settled, that the property would not under such circumstances be altered (*n*).

(*l*) 2 Bl. Com. 450.

(*m*) *Wikes* v. *Morefoots*, Cro. Eliz. 86.

(*n*) *Gibbs*'s Case, Owen, 27; and 1 Leon. 158.

CHAP. III.

On the Construction of Contracts of Sale.

HAVING in the preceding chapters given our attention to the requisites which are by law necessary to constitute a valid contract of sale, and considered as well who are capable of being parties to it, as the form and manner in which it may be effected, we will now pursue our subject, and investigate those rules of construction by which such contracts are to be explained, in cases where any ambiguity exists as to the meaning of the terms in which they are expressed. The great object of the law, in the exposition of agreements of every description, is to effectuate the intention of the parties; and in the construction of contracts for the sale of personal property, as no particular form of words is necessary, we shall not find ourselves involved in any troublesome technicalities, but shall with pleasure perceive that the Courts have constantly given such a rational interpretation to those agreements as is best calculated to carry the intention of the parties into effect, and at the same time to support (as far as they are consistent with the rules of law) the usages of trade, and the ordinary mode of transacting commercial business.

1st. It is sometimes doubtful, whether an agreement amounts to a sale or not. Thus, where *A.* the

owner of a ship executed an absolute bill of sale of it to *B.* and by another deed of the same date assigned other property to *B.*, which deed of assignment (reciting that the bill of sale was for the better securing of a sum of money lent by *B.* to *A.*; and also reciting a bond and warrant of attorney given by *A.* to *B.* to secure the same) declared that these several deeds and instruments were made to enable *B.*, by sale of all the things comprised in them, to raise the sum lent without the concurrence of *A.* at any time before the money should be paid off; but in the same deed there was a covenant, that upon payment of the money *B.* should re-convey to *A.*, but so as not to prevent *B.* from selling, &c. at any time before the full payment, &c.: The court collected from the contents of the deeds that the intention of the parties was, that the ship should be pledged for the security of the money advanced, and that this was not an absolute conveyance of the ship, but merely a mortgage (*o*).

2dly. Another question which sometimes arises is, whether, when several things are bought at the same time, the contract is *entire*, so that the buyer is not bound to accept one of the articles unless the others are sent with it; and it seems that in all such cases the purchaser has a right to insist on the performance of the whole contract; and is not bound to accept any one parcel of goods without the rest. But where a person has ordered three different parcels of goods at the same time to be sent to him, though he may refuse to receive one parcel without the others, yet

(*o*) *Jackson* v. *Vernon*, 1 H. Bla. 114.

if he accept the first parcel, he cannot afterwards refuse the second, because the third is not sent; for by the acceptance of the first, he has rebutted the presumption of a joint contract including all the articles ordered (*p*). If, however, the sale be of a certain quantity of a given commodity, the delivery of part by the seller, and acceptance by the buyer, will not sever the entirety of the contract; as, where one had agreed to deliver one hundred bags of hops at a certain price by a certain time, and having delivered part, commenced an action for the price before the time for the delivery of the remainder had expired, the Court were clear that the contract was entire, and that the plaintiff had no right to bring an action until the whole quantity was delivered (*q*). Where an agent sold two horses, one belonging to *A.* and the other to *B.* for an entire price, and warranted both of the horses, the buyer was not allowed to support an action against *A.* for the unsoundness of his horse, for the contract was entire; and if *B.*'s horse had proved unsound, that would have been a breach of the contract, but *A.* would not have been liable in that event (*r*).

3dly. Contracts of sale are sometimes entered into subject to particular conditions; and many points have been decided in the courts of law respecting the legal effect of such conditions. It was held in an old case, that where *H.* agreed with *A.* that *A.*

(*p*) *Champion* v. *Short*, 1 Campb. 53.

(*q*) *Waddington* v. *Oliver*, 2 New Rep. 61; *Walker* v. *Dixon*, 2 Stark. 281, accord.

(*r*) *Symonds* v. *Carr*, 1 Campb. 361.

should take the sheep of *H.* and depasture them for a certain time, and that if at the end of the time he would pay *H.* so much for the sheep, he should have them, that the agreement did not amount to a sale; and that a sale by *H.* of the sheep to another person before the day agreed on was good. And *Lord Chief Justice North* said, that if a horse was bought in a market, for which the vendee was to pay 10 *l.*, if the ready money was not paid the property was not altered, and the vendor might sell him to another (*s*). But it was decided in a very late case, that if the purchaser of goods neglect to take them away in a reasonable time, and after notice, though the seller may charge him warehouse-rent, or he may bring an action for not removing them, if he be prejudiced by the delay, yet that the buyer's neglect does not authorize the seller to put an end to the contract and sell the goods to another person (*t*).

Upon a contract to purchase 300 tons of *Campeachy* logwood, at 35 *l.* per ton, to be of real merchantable quality, and such as might be determined to be otherwise, by impartial judges, to be rejected, the vendee is bound to take so much of the logwood as turns out to be of the sort described at the contract price (*u*).

Where the goods of *A.* were sold by a broker to *B.* on a *Saturday*, "the quality to be approved on *Monday*," and the buyer did not renounce the contract on *Monday*, it was held, that after that day

(*s*) *Mires* v. *Selebay*, 2 Mod. 242.

(*t*) *Greaves* v. *Ashlin*, 3 Campb. 426. See *Langfort* v. *Admix. of Tiler*, 1 Salk. 113, post.

(*u*) *Graham* v. *Jackson*, 14 East, 498.

the contract became absolutely binding on both parties (*x*).

By a bill of lading goods are deliverable to *J. S.* if he shall accept and pay a bill of exchange, if not to the holder of the bill of exchange. *J. S.* accepts the bill of exchange, and indorses the bill of lading to *A.*, but does not pay the bill of exchange when it became due. Upon *J. S.*'s dishonour of the bill, the property in the goods vested in the holder of the bill (*y*).

A. by letter, offers to sell to *B.* certain specified goods, receiving an answer by return of post; but, owing to *A.*'s misdirecting the letter, there was some delay before it reached *B.*, and *B.*'s answer, notifying the acceptance of the offer, though sent by the first post after the receipt of the letter, reached *A.* two days later than he expected; *A.* had in the mean time sold the goods; the Court held it a binding contract between the parties from the time the terms were agreed to by *B.*, the delay in *B.*'s notifying the acceptance of the contract having arisen from the mistake of *A.* (*z*)

4thly. Sometimes stipulations are introduced into contracts of sale respecting the particular ship, or other mode of conveyance by which the goods are to be carried from the vendor to the vendee. *A.* sold to *B.* the hemp that might be shipped on board certain vessels at *Riga*, not exceeding 300 tons, by *C.*

(*x*) *Humphries* v. *Carvalho*, 16 East, 45.

(*y*) *Barrow* v. *Coles*, 3 Campb. 92.

(*z*) *Adams* v. *Lindsell*, 1 Barn. & Ald. 681.

the agent of the concern. *C.* shipped only 71 tons of hemp on account of *A.*, but upwards of 300 tons on account of other persons. *Lord Ellenborough* ruled, that the contract must be confined to such hemp as *C.* should ship as agent of *A.*, who, in effect, had said by the contract, "We will sell you all that our agents at *Riga* ship for us, to the amount of 300 tons. If they send us so much, you shall have it; if they send us none, we have sold none to you (*a*)."

Where the defendants agreed to ship certain quantities of hemp for the plaintiff on a given day, it was held no defence to an action for not delivering the hemp, that the *Russian* government had previously confiscated it as *British* property; as the defendants had absolutely engaged that the hemp should be shipped, they were liable for its not being done, from whatever cause the circumstance had arisen (*b*).

Where the bought and sold note was, "sold for, &c. 32 tons, more or less, of *Riga Rhine* hemp, on arrival per *Fanny* and *Almira*, at, &c." it was held, that the contract meant on the arrival of the goods; and on the ship arriving without the goods, the contract was at an end (*c*).

Where in a contract for the sale of sugar there is the following term, "free on board a foreign ship," the seller is not bound to deliver it into the hands of the buyer, or to transfer it into his name in the books

(*a*) *Hayward* v. *Scougall*, 2 Campb. 56.

(*b*) *Splidt* v. *Heath*, 2 Campb. 57. See *Atkinson* v. *Ritchie*, 10 East, 530.

(*c*) *Boyd* v. *Siffkin*, 2 Campb. 326; and see *Hawes* v. *Humble*, Id. 327, n.

of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name (*d*).

A contract was made in *London* for the sale of tallow by a particular ship on arrival, to be taken at the king's landing-scale; if it should not arrive on or before a given day the bargain to be void. The ship was wrecked off the coast of *Scotland*, but the cargo was saved, and might have been sent to *London* before the specified day. The purchaser did not offer any indemnity to the sellers if they would bring the tallow to *London*. *Lord Ellenborough*, at *Nisi Prius*, and the Court of *King's Bench* afterwards, held that the sellers were not answerable for the non-delivery of the tallow (*e*). "In construing such a contract," said the noble and learned Judge, "I must consider that it was the intention of the parties it should be void, unless the commodity, in the ordinary course of trade and navigation, arrived at the port of destination by the appointed day. Numberless disputes would otherwise arise as to the respective obligations both of vendors and purchasers."

A contract for the sale of flax expected from *St. Petersburgh* contained a stipulation, "that the flax should be despatched from *St. Petersburgh* not later than *July* 31st, *O. S.* either for *London* or *Hull*." It was held sufficient, that before the day specified the flax was despatched from *St. Petersburgh* in lighters, and put on board the ship at *Cronstadt*, although the ship was not despatched from *Cronstadt*

(*d*) *Wackerbarth* v. *Masson*, 3 Campb. 270.

(*e*) *Idle* v. *Thornton*, 3 Campb. 274.

on her homeward voyage till after that day. A stipulation in such contract, that, "as soon as the seller knows the name of the vessel in which the flax will be shipped he shall mention it to the buyer," is a condition precedent; and as the seller had in fact known the name of the ship eight days before he communicated it to the buyer, the latter was on that account not bound to receive the flax (*f*).

Under a contract to sell fifty tons of hemp, to be delivered by a certain day, and the ship's name to be disclosed as soon as known, the seller is not bound to send all by one ship; and having (through mistake) announced more to be coming by one ship than there actually was, he was at liberty to declare the residue coming by other ships (*g*).

A, living in *London*, received an order from *B*. residing near *Bristol*, to send goods to him by any conveyance which would reach *Bristol*, informing him when he should send them. *A*. sent the goods to a wharf from which vessels sailed for *Bristol*, and informed *B*. (as he was told at the wharf,) that the goods would come by the ship *Commerce*; in fact the goods were not sent by the *Commerce*, which happened to have been previously fully laden, but were afterwards sent by another vessel. *B*. after the arrival of the *Commerce* at *Bristol*, without the goods, made no further inquiries for them, and *A*. did not know, till after he had required payment, that the goods had been sent by another ship, which fact he then

(*f*) *Busk* v. *Spence*, 4 Campb. 329.

(*g*) *Thornton* v. *Simpson*, 6 Taunt. 556, and Holt's N. P. R. 164.

communicated to *B*. The court held *B*. liable for the price of the goods (*h*).

5. With respect to stipulations concerning the time and manner of payment, it has been decided, that a contract of sale, in which a day of payment is limited, is good immediately, and an action lies upon it without payment; but where no day of payment is mentioned, the bargain is void if the vendee do not pay the price agreed upon immediately (*i*).

Goods were sold, to be paid for on delivery by a bill at two months, but the vendor suffered part of the goods to be taken away without receiving the bill. *Lord Ellenborough* held that this was not a waver of the condition, but only a dispensation *pro tanto* (*k*).

Where goods were sold to a purchaser on a credit of six or nine months, the purchaser was held to have an election of either six or nine months as the time of payment; and as he did not pay for the goods at the end of six months, the Court held him to have elected nine months (*l*).

The purchaser of goods, to be paid for by a bill upon his agent, is not discharged by the seller taking a renewal of the bill from the agent, without giving the purchaser notice, if the agent had no funds of the purchaser in hand, to pay the bill when it became due (*m*).

On a contract for corn, to be delivered at a certain time and place, the delivery of the corn is not a con-

(*h*) *Cooke* v. *Ludlow*, 2 New Rep. 119.

(*i*) Dyer 30. a. See Com. Dig. Agreement, B. 3.

(*k*) *Payne* v. *Shadbolt*, 1 Campb. 427.

(*l*) *Price* v. *Nixon*, 5 Taunt. 338.

(*m*) *Clark* v. *Noel*, 3 Campb. 411.

dition precedent to the payment of the price, but both are concurrent acts, to take place at the same time (*n*). And on an agreement to transfer stock to *A.* and *A.* to pay for it, the transfer is not a condition precedent (*o*).

Where goods were sold upon a contract that the vendee should pay for them in three months, by a bill at two months, it was held that the credit was for five months, and consequently that an action for goods sold and delivered could not be supported on the contract at the end of three months, on the vendee refusing to give the bill (*p*).

Where goods were sold "to be paid for by *E*'s. bill on *P.* without recourse to the buyer in case of its not being paid," although the buyer then knew the bill to be worth nothing, he was held not to be liable in an action of *indebitatus assumpsit* for the value of the goods (*q*).

6. If goods be sold by *sample*, and the bulk, on being delivered to the vendee, is found not to correspond with the sample, he is not bound to receive the goods, though it be usual in the particular trade for the purchaser in such a case to take the goods, the seller making him an allowance for the inferiority of the quality (*r*).

7. Some doubts have been entertained in the Courts whether the entry made in the broker's book, or the *bought and sold notes* which he delivers to the

(*n*) *Morton* v. *Lamb*, 7 T.R. 125.

(*o*) *Blackwell* v. *Nash*, Str. 535.

(*p*) *Mussen* v. *Price*, 4 East, 147.

(*q*) *Read* v. *Hutchinson*, 3 Campb. 352.

(*r*) *Hibbert* v. *Shee*, 1 Campb. 113.

seller and buyer, are to be considered as the actual contract between the parties. *Lord Ellenborough* observed, in a case at *Nisi Prius* (*s*), that "in the case of *Hinde* v. *Whitehouse* (*t*), the entry in the book was considered as the contract, and the bought and sold notes were merely evidence of it. But that case did not go the length of deciding, that where no entry is made in the broker's book, the bought and sold notes might not be sufficient to satisfy the statute of frauds." On the other hand, Sir *Vicary Gibbs* has said (*u*), that "if the broker deliver a different note of the contract to each party contracting, there is no valid contract; that the case which stated the entry in the broker's book to be the original contract had been since contradicted; and that each was bound by the note which the broker delivers; and if different notes are given to the parties, neither can understand the other." It certainly seems difficult to understand how the entry in the broker's book, which the parties do not see, can be the contract between them, when it is obvious that their understanding of the agreement must be drawn from the notes delivered to them respectively. It is also worthy of observation, that the case of *Hinde* v. *Whitehouse*, (the facts of which case are stated in the last chapter) was a sale not by a broker, but by an auctioneer; and that neither a bought and sold note was given, nor any valid entry of the contract in the auctioneer's book made in that case; which was decided in favour of the plaintiff,

(*s*) *Dickenson* v. *Lilwal*. 1 Stark. 128.

(*t*) 7 East, 558; ante, 39, 40. *Heyman* v. *Neale*. 2 Campb. 337, accord.

(*u*) *Cumming* v. *Roebuck*. Holt, N. P. C. 173.

solely on the ground of a part-delivery of the goods having taken place within the statute of frauds.

Where the broker makes a mistake in the contract, by describing erroneously, in the bought and sold note, the firm of the sellers, the purchaser is not at liberty to avoid the contract on that account, after having treated it as a subsisting contract upon a subsequent communication from the sellers, unless he show that he has been prejudiced (*x*).

8. *A.* exchanged a watch with *B.* for a pair of candlesticks, which *B.* warranted to be silver; the candlesticks proved not to be silver; but *Lord Ellenborough* held, that the property in the watch remained in *B.*, and that *A.* could not maintain an action of trover for it (*y*).

9. Where upon a sale of goods the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale-note which does not refer to the sample it is not a sale by sample (*z*).

10. Where one person purchases goods, and another is afterwards permitted to share in the adventure, that circumstance does not make him liable to the seller for the price (*a*). In this case Mr. *Justice Gibbs* says, "I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor: as, if the parties agree among themselves that one house shall purchase the goods, and let the other into an interest in them, that

(*x*) *Mitchell* v. *Lapage*, Holt, N. P. R. 253.

(*y*) *Emanuel* v. *Dane*, 3 Campb. 299.

(*z*) *Meyer* v. *Everth*, 4 Campb. 22.

(*a*) *Young* v. *Hunter*, 4 Taunt. 582.

other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods.

11. *A.* sells goods to *B.*, who, being unable to pay for them, transfers them to *C.*, who promises *A.* to pay for them: this is a new sale from *A.* to *C.* (*b*).

12. Where *A.* buys goods for *B.*, but pays the price out of his own money, the property will vest in him, and will not be divested, though a bill of sale be afterwards executed to *B.*; but if the bill of sale had been so executed at the time of the sale to *B.* the property in the goods would have vested in him (*c*).

13. A contract to transfer shares in the *East India Company*, or to deliver stock, within a month, means a lunar month (*d*); but a month in a bond has been interpreted to mean a calendar month, that being, it is said, the general understanding in cases of that nature (*e*).

Where in a covenant for transferring stock it was agreed that notice should be given or left for the defendant, and the plaintiff stated in his declaration that notice was left at the defendant's house, but did not say for him, the Court held the notice good (*f*).

(*b*) *Browning* v. *Stallard*, 5 Taunt. 450.

(*c*) 12 Mod. 344.

(*d*) *Barksdale* v. *Morgan*, 4 Mod. 185. *Jocelyn* v. *Hawkins*, Str. 446.

(*e*) *Titus* v. *Lady Preston*, Str. 652.

(*f*) *Jeffry* v. *Wood*, 11 Mod. 351.

14. A clause in a bill of lading, allowing a certain number of days for unloading the cargo, has been explained by usage to mean working-days (*g*).

15. *A.* agrees to purchase a gun of *B.* for forty-five guineas; but *B.* is to take another gun of *A.* in part payment at thirty guineas. *A.* having refused to deliver his gun and complete the contract, *B.* is entitled to recover the sum of forty-five guineas as the stipulated price (*h*).

16. In an action of covenant for not accepting *South Sea* stock, the defendant pleaded that the contract was never registered according to stat. 7 Geo. 1, st. 2, s. 8, which requires such contracts to be registered, and that the registers should express the names of the parties for whose benefit such contracts were made. The contract was in fact entered in the *South Sea* Company's books, as follows: "This is for my proper use and benefit, *Philip Wilkinson.*" The registry was held sufficient (*i*).

17. Where goods are delivered on the terms of sale or return, they must be returned in a reasonable time to avoid the sale (*k*).

(*g*) *Cochran* v. *Retberg*, 3 Esp. 121.

(*h*) *Forsyth* v. *Jervis*, 1 Stark. 437.

(*i*) *Wilkinson* v. *Myer*, Str. 585, and 2 Ld. Raym. 1350. See *Rogers* v. *Wilson*, Com. 365.

(*k*) *Bailey* v. *Gouldsmith*, Peake, 56.

CHAP. IV.

Of Warranties.

1. IT is very usual in sales of personal property for the seller to warrant the thing sold to possess some particular quality, as that a horse is sound, or of a particular age; that wine is of a particular vintage, &c. Some warranties are implied by law, without any particular stipulation between the parties. Thus the seller is always understood to undertake that the commodity he sells is his own; and if it prove otherwise, an action on the case in the nature of deceit lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also, if he that sells any thing warrants that it shall be good, the law annexes a tacit contract to this warranty, that if it be not so he shall make compensation to the buyer. The warranty must take place upon the sale, for if it be made afterwards, and not at the time of the sale, it is a void warranty, being made without consideration (*a*). If, however, upon a treaty for the buying of certain goods, the buyer should ask the seller if he would warrant them, and he should warrant them, and on the buyer demanding the price, the seller should fix it, and allow the

(*a*) 3 Bla. Com. 166.

buyer two or three days to consider of it, and then the buyer should come and give the price, the warranty, though made before, would be considered part of the contract, and would be binding (*b*). A general warranty will not extend to guard against defects that are plainly and obviously the objects of sense; as, if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth be warranted to be of such a length, when it is not, an action on the case lies for damages, for that cannot be discerned by sight, but only by measuring the cloth. And if a horse be warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it has been held that an action on the case lies to recover damages for this imposition (*c*).

It is laid down, by Sir *W. Blackstone*, in the *Commentaries* (*d*), that a warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*, as, that a horse is sound at the time of the sale, and not that he will be so two years hence. It has, however, since been declared by *Lord Mansfield* (*e*), that "there is no doubt but you may warrant a future event." There seems obviously to be no objection in reason to such a warranty.

The following *dictum* of *Lord Holt* is reported in *Salkeld's Reports* (*f*), "where one having the posses-

(*b*) Per Holt, C. J. in *Lysney* v. *Selby*, Ld. Raym. 1120.

(*c*) 3 Bla. Com. 165. *Butterfeild* v. *Burroughs*, 1 Salk. 211.

(*d*) 3 Bla. Com. 166.

(*e*) In *Eden* v. *Parkison*, Dougl. 735.

(*f*) *Medina* v. *Stoughton*, 1 Salk. 210.

sion of any personal chattel, sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title can be made out; *aliter*, where the seller is out of possession, for there may be room to question the seller's title; and *caveat emptor* in such case to have either an express warranty, or a good title." The soundness of this distinction between the vendor being in or out of possession may well be doubted; and has been disapproved of by Mr. *Justice Buller* (*g*), who observed, that it was not mentioned by *Lord Raymond* in his report of the same case (*h*).

Where a publican agrees with a brewer to take all his beer of him, the brewer is bound to supply him with beer of a fair merchantable quality (*i*).

In every contract for the sale of goods, where there is not an opportunity of inspection, there is an implied warranty that the commodity is saleable (*k*). But if there be a latent defect in the thing sold, which defect is unknown to the seller, though a fair price be given by the buyer for the commodity, the law does not raise an implied warranty that it shall be merchantable; and if it be sold by sample, it will be sufficient that the bulk corresponds with the sample (*l*). And though it was once held by *Lord Kenyon*, at *Nisi Prius* (*m*), that though a ship was sold "with all faults," the seller was liable for secret faults in the

(*g*) 3 T. R. 57, 8.

(*h*) Ld. Raym. 593.

(*i*) *Holcombe* v. *Hewson*, 2 Campb. 391. *Cooper* v. *Twibill*, 3 Campb. 286, *accord.*

(*k*) *Gardiner* v. *Gray*, 4 Campb. 144. *Laing* v. *Fidgeon*, 4 Camp. 169, & 6 Taunt. 108.

(*l*) *Parkinson* v. *Lee*, 2 East, 314.

(*m*) *Mellish* v. *Motteux*, Peake, 115.

ship, which were known to him at the time of the sale; and that the words "all faults," must be understood to relate only to those faults which the buyer could have discovered, or which the seller was unacquainted with; yet that decision has been since over-ruled by *Lord Ellenborough* (*n*), who held, in a similar case, that the seller was not answerable for any faults, unless he used some artifice to prevent their being discovered by the purchaser; and this decision of *Lord Ellenborough* has been since approved of by the Court of *Common Pleas* (*o*). It is, however, quite clear that any intentional deception practised by the seller for the purpose of disguising the latent defects of a commodity, in order to elude the vigilance of the buyer, would be considered fraudulent, and would consequently subject the seller to an action (*p*).

The defendants, who had purchased ten dozen of *Burgundy* wine of the plaintiffs, about a year before, applied to the plaintiffs to have it exchanged for *Champagne*, which was, at that time, of the same price. The plaintiffs agreed to this, and the exchange took place. When the *Burgundy* was sent to the defendants, it was of the first quality, and in the best condition; but when it was returned, it was quite sour, and only fit to be used as vinegar. An action was brought to recover the value of the *Champagne*, or a compensation for the bad condition of the *Burgundy*. There was no evidence of any representation by the defendants respecting the condition of

(*n*) *Baglehole* v. *Walters*, 3 Campb. 154.

(*o*) *Pickering* v. *Dowson*, 4 Taunt. 779. See however *Hill* v. *Gray*, 1 Stark. 434, ante.

(*p*) *Schneider* v. *Heath*, 3 Campb. 506.

the wine, or of any promise by them upon the subject. *Lord Ellenborough*, who tried the cause, said he was of opinion that, without evidence of an express warranty, or of direct fraud, the action could not be supported, and that the maxim of *caveat emptor* applied to this case (*q*).

If a representation be made of the state of a commodity previously to a sale of it, and a written agreement of sale be then drawn up, of which the representation makes no part, the seller will not be bound by the representation (*r*).

2. With respect to express warranties, all that can be reasonably required of the seller of a commodity is, that he be guilty of no deception or unfairness in the representations which he makes to the buyer of the state of the commodity. If therefore, the representation be positive, he ought to be bound by it; but if he state that which he believes to be true, giving the purchaser, at the same time, to understand, that he has no absolute knowledge on the subject, it would be very hard if he should be held bound by such a representation, though the supposed incident, or quality which he represented to belong to the subject, or some fact which he had stated concerning it, should be afterwards proved not to exist. Where, therefore, a man on the sale of a horse referred to a written pedigree of the horse to ascertain his age, and at the same time stated to the buyer that he knew nothing more about it than what

(*q*) *La Neuville* v. *Nourse*, 3 Campb. 351.

(*r*) *Pickering* v. *Dowson*, 4 Taunt. 779. And see *Meyer* v. *Everth*, 4 Campb. 22. *Gardiner* v. *Gray*, 4 Campb. 144.

the pedigree disclosed, he was held not to be liable to an action by the purchaser on the pedigree proving false, of which fact the seller had no knowledge at the time of the sale (*s*). The name of a painter being printed opposite that of a picture in a catalogue does not amount to a warranty that the picture was painted by that particular artist (*t*).

Where a horse sold at a sale was warranted sound, and six years old, and a condition of the sale was, that unless the horse were returned in two days he should be considered sound, the condition was held not to extend to the age of the horse; and it being discovered ten days after the sale that he was twelve years old, the buyer was held entitled to return him (*u*). But, where a horse is warranted to be "in no manner vicious," and the seller agrees to take him back if he should prove so, the buyer is bound to return him within a reasonable time (*x*).

It was held by *Lord Chief Justice Eyre*, that a temporary lameness was not to be considered unsoundness in a horse (*y*); but *Lord Ellenborough*, in a later case, ruled, that a warranty of soundness was broken if the animal, at the time of the sale, had any infirmity which rendered him less fit for present service (*z*).

Where an express warranty is made on the sale of a horse, the buyer may, on a breach of the warranty,

(*s*) *Dunlop* v. *Waugh*, Peake, 123.

(*t*) *Jendwine* or *Jewdwine* v. *Slade*, 2 Esp. 572; and Peake on Evidence, 244.

(*u*) *Buchanan* v. *Parnshaw*, 2 T. R. 745. See *Mesnard* v. *Aldridge*, 3 Esp. 271.

(*x*) *Adam* v. *Richards*, 2 H. Bla. 573.

(*y*) *Garment* v. *Barrs*, 2 Esp. 673.

(*z*) *Elton* v. *Brogden*, 4 Campb. 281.

either rescind the contract entirely, and return the horse, (in which case he may support an action for money had and received against the seller for the recovery of the price which he has paid for him), or he may retain the horse, and support an action against the vendor for the damages sustained by the breach of the warranty (*a*).

It is often difficult to ascertain what amounts to unsoundness in a horse. The unpleasant habit of some horses, called *roaring*, has been held both by Sir *James Mansfield* and *Lord Ellenborough* not to be unsoundness (*b*): but, in a later case, before *Lord Ellenborough*, evidence having been given by a veterinary surgeon, that roaring is occasioned by the circumstance of the neck of the windpipe being too narrow for accelerated respiration, and that the disorder is frequently produced by sore throat, or other topical inflammation, and is of such a nature as to incommode a horse very much when pressed to his speed, his Lordship held it to be unsoundness (*c*). *Cribbiting* is not unsoundness (*d*); and the learned in the veterinary art are said to be divided in opinion respecting the unsoundness of *thrushes*, *splints*, and *quidding* (*e*). Where a horse had been sold with a warranty of soundness, and the buyer having stated to the seller, in a subsequent conversation, that the horse was unsound, the seller said, that if the horse was unsound he would take him again, and return the

(*a*) *Fielder* v. *Starkin*, 1 H. Bla. 17. 1 T. R. 136, accord. *Curtis* v. *Hannay*, 3 Esp. 82. accord.

(*b*) *Bassett* v. *Collis*, 2 Campb. 523.

(*c*) *Onslow* v. *Eames*, 2 Stark. 81.

(*d*) *Bröennenburgh* v. *Haycock*, Holt, N. P. R. 630.

(*e*) 2 Campb. 524, note.

price, this promise did not discharge the original warranty, on which the buyer was still entitled to sue (*f*).

If a servant, who is intrusted by his master to sell a horse, warrant him sound, the master will be bound by the warranty (*g*).

Where on a sale of bacon it was warranted to be prime singed bacon, evidence was held not to be admissible of a practice in the trade to receive bacon in some degree tainted as prime singed bacon; nor of a practice in the trade precluding the purchaser from all remedy if he do not discover and point out the defect by an early day (*h*).

It being customary in the pimento trade for the seller to declare when the pimento is sea-damaged, if he sell it without such declaration it will be a warranty that the pimento is not sea-damaged (*i*).

A warranty that turnip-seed was "good white round turnip-seed," which the seller *could* warrant, was held sufficient to bind him (*k*).

The vendee of a merchantable commodity, warranted to be of the best quality, proceeds to use it from time to time till the whole is consumed, when the value of the article can no longer be ascertained; having given no notice to the vendor, during the whole time, of any defect in the article, and having deprived the vendor of the means of proving the value of the article by proper tests; he cannot, under such

(*f*) *Payne* v. *Whale*, 7 East, 274.

(*g*) *Alexander* v. *Gibson*, 2 Campb. 555. *Helyear* v. *Hawke*, 5 Esp. 72, accord.

(*h*) *Yates* v. *Pym*. 6 Taunt. 446. Holt, N. P. R. 95. S. C.

(*i*) *Jones* v. *Bowden*, 4 Taunt. 847.

(*k*) *Button* v. *Corder*, 7 Taunt. 405.

circumstances, resist an action by the vendor for the price of the goods, on the ground that they were not of the quality warranted (*l*).

A. sells *B.* a bowsprit, which, at the time of the sale, appears to be perfectly sound, but, after being used for a time, turns out to be rotten. In the absence of fraud, the vendor is entitled to receive from the vendee what the bowsprit appeared to be worth at time of the sale, no specific price having been stipulated for (*m*).

Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury, whether the vendee, who complains that they are unfit for the purpose for which they were intended, has used them further than was necessary to give them a fair trial. If not, the commodity being bulky, and, after a reasonable time, found unfit for service, the vendor, on notice being given by the vendee, is bound to take them away; but if the vendee retain the utensils, without giving such notice, he is liable to pay the value (*n*).

In an action for the price of sugars sold by the plaintiff to the defendant, tried before *Lord Ellenborough*, it appeared that the sugars had been sold at a public sale by sample: the bulk, on being examined, was found not to correspond in colour with the sample, and to be less valuable. The plaintiff, nevertheless, required that the defendant should take the sugars, on being allowed a compensation for the inferiority;

(*l*) *Hopkins* v. *Appleby*, 1 Stark. 477.

(*m*) *Bluett* v. *Osborne*, 1 Stark. 384.

(*n*) *Okell* v. *Smith*, 1 Stark. 107.

insisting, that according to the usage of the trade, where samples have been drawn without fraud, and the bulk, notwithstanding, proves inferior, sworn brokers are to be called in to estimate the difference, and the vendor making an allowance for this, the purchaser must stand to his bargain. The defendants refused to accede to this proposal. The sale was made in *April*; and it appeared that the samples were taken from the bulk at the time of the sugars being landed in the *West India* Docks in the preceding *November*. From the samples being exposed to the air during this long interval, they had become much whiter than when originally taken. The bulk would have been of equal value to the sugar-baker with the sample; but for retail trade, much more depends on colour than quality. The purchaser at a public sale has no means of knowing the time when the samples exhibited have been drawn. It was proved at the trial, that making allowance for the difference was the common mode of settling disputes of this kind in the trade. *Lord Ellenborough* said, "the question here is, whether the contract has been substantially performed. Does the sugar accord with the sample exhibited at the sale? If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for the dissimilarity. This is not a performance of the contract: and though there should prevail an habitual mode of arrangement between dealers in the article, I have always a right to say, 'Is this what I meant to purchase?' A spirit of candour and accommodation may lead to a compromise between the parties; but the legal mode of dealing is, that if the

article agreed on is not furnished, I may reject it, and keep my money in my pocket. It appears that, with respect to sugars, there will be a difference between the bulk and sample, where the sample has been for some time exposed to the air; and if the party had full notice when the sample was drawn he might be expected to calculate upon the difference; but all that is communicated at these sales is, that the sugars, of which samples are produced, lie in the docks, and the bidders have a right to presume that the samples have been recently drawn. Did the sugar in question then accord in quality with the sample; and was it fit for the purposes in the contemplation of the purchasers?" The jury found a verdict for the defendant (z).

CHAP. V.

Of Sales by Auction.

WE have already had occasion, in a former chapter, to treat on the subject of sales by auction, as far as they are affected by the statute of frauds. It has there been shown, that an auctioneer is considered in law as an agent both for the buyer and the seller. If he sell goods, and do not disclose his principal, he is liable to an action at the suit of the purchaser for the completion of the contract of sale (a). Where

(z) *Hibbert* v. *Shee*, 1 Campb. 113.
(a) *Hanson* v. *Roberdeau*, Peake, 120.

several distinct lots are sold at the same auction to the same person, each lot is a distinct contract (*a*).

An auctioneer has such a special property in goods sold by him as will enable him to maintain an action for the price of the goods against the vendee, even though the goods were sold at the house of the auctioneer's employer, and were known to be his property (*b*).

If the sale of an estate by auction become nugatory by the negligence of the auctioneer who is employed to sell it, he will not be entitled to any recompense for his services from the vendor (*c*). And where an auctioneer who was employed to sell an estate neglected the proper precautions pointed out by the acts of parliament, to avoid the payment of the auction-duty, in the event of there being no sale, in consequence of which, though no sale took place, he was afterwards called on by the Crown, and obliged to pay the duties, he was held not entitled to call upon his employer to re-pay him (*d*).

Where a deposit is paid to an auctioneer, he is to be considered as a stake-holder till the sale is completed (*e*).

If an auctioneer sell goods, and deliver them without notice of any lien or claim which he has on the owner, and the buyer, without such notice, settle for the goods with the owner, the auctioneer cannot sue the buyer for the price of the goods. And if the

(*a*) *Emmerson* v. *Heelis*, 2 Taunt. 38.

(*b*) *Williams* v. *Millington*, 1 H. Bla. 81.

(*c*) *Denew* v. *Daverell*, 3 Campb. 451.

(*d*) *Capp* v. *Topham*, 6 East, 392.

(*e*) *Burrough* v. *Skinner*, 5 Burr. 2639. See *Edwards* v. *Hodding*, 5 Taunt. 815.

auctioneer sell the goods of *B.* as the goods of *A.* and the buyer pay the price to *A.* the auctioneer cannot recover the price from the buyer (*f*). If no payment be made by the buyer in such case, and the auctioneer bring an action against him for the price of the goods, the buyer may set off a debt due from *A.* to him (*g*).

The clerks of auctioneers are not authorized to act, in the absence of their masters, as agents for the employers of the auctioneers, unless the employers empower them so to do (*h*). The authority of an auctioneer as agent is put an end to by the completion of the sale; and nothing done by him afterwards relative to the subject matter of it will bind his principal (*i*).

A person selling goods by auction may reserve to himself the right of bidding, or may employ a person to bid for him; but he must give notice of his intention to do so, otherwise the employment of *puffers* is a fraud on the *bonâ fide* bidders, and cannot be supported at law. Therefore, where the owner of a horse, who had employed an auctioneer to sell him, gave the auctioneer secret orders not to let the horse go under a certain price, and the auctioneer sold him for a smaller sum than the price specified, the owner of the horse could not, on that account, support an action against the auctioneer; the owner would, however, have been justified in directing the auctioneer to *put up* the horse at a particular price, and

(*f*) *Coppin* v. *Walker*, 7 Taunt. 237.

(*g*) *Coppin* v. *Craig*, 7 Taunt. 243.

(*h*) *Coles* v. *Trecothick*, 9 Ves. 243. 251.

(*i*) *Seton* v. *Slade*, 7 Ves. 276.

the auctioneer would have been bound to obey his directions (*k*). If the owner of an estate put it up to sale by auction, and employ puffers to bid for it, without declaring that he does so, the highest bidder will not be obliged to complete the sale (*l*).

A bidder at an auction may retract his bidding at any time before the auctioneer's hammer is knocked down (*m*).

Verbal declarations made by the auctioneer, contrary to the printed conditions of sale, are of no validity, and cannot be admitted in evidence to contradict the printed conditions (*n*).

The printed conditions of sales by auction are the terms of the contract between the buyer and seller, and are in all cases binding on the parties; and they are sufficiently made known to the bidders, by being posted up in the public sale-room, under the auctioneer's box (*o*).

The sales of the *East India Company* being subject to a regulation, that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment shall forfeit the deposit, "and shall be rendered incapable of buying again at any future sale, until he shall have given *satisfaction* to the court of directors;" it was held by the Court of *Common Pleas*, that the term "satisfaction" meant pecuniary compensation for the non-performance of his agreement to pay on the appointed day; and that

(*k*) *Bexwell* v. *Christie*, Cowp. 395.

(*l*) *Howard* v. *Castle*, 6 T. Rep. 642.

(*m*) *Payne* v. *Cave*, 3 T. Rep. 148.

(*n*) *Gunnis* v. *Erhart*, 1 H. Bla. 289.

(*o*) *Mesnard* v. *Aldridge*, 3 Esp. 271.

a buyer having made default on the day, but afterwards, within a further time given to him by the Company, paid the remainder of the purchase-money, with interest, might maintain an action against the Company for refusing to allow him to become a bidder at their sales, such sales being by 9 & 10 W. 3, c. 44, s. 69, declared to be public and open sales. And the Court seemed to think it very doubtful whether, since the passing of 18 Geo. 2, c. 26, which regulates the deposits, forfeitures, and incapacities of bidders at the Company's tea-sales, the Company can make or enforce any other regulations affecting these sales than those which are enacted by that act of parliament (*p*).

The conditions of a sale by auction were, that the goods should be cleared away at the expense of the buyer in 14 days, the price to be paid on or before delivery; and that if any lots remained uncleared after the time allowed, the deposit-money should be forfeited, the goods re-sold, and the loss on the re-sale made good by the purchaser. The broker gave a bought note, which allowed 14 days for receiving and delivery. It was held by the court of *Common Pleas* that only the buyer had 14 days to take away the goods, but that the seller was bound to deliver them immediately (*q*).

By the statutes 17 Geo. 3, c. 50, s. 10, and 19 Geo. 3, c. 56, s. 12, it is enacted, that if the owner of any estate, goods or effects, put up to

(*p*) *Eagleton* v. *The East India Company*, 3 Bos. & Pul. 55.

(*q*) *Hagedorn* v. *Laing*, 6 Taunt. 162.

auction, shall become the purchaser by himself or his agent, without fraud, the *Commissioners of Excise*, &c. shall be authorized to make an allowance to such owner of the duties arising on such biddings, provided notice be given to the auctioneer before the bidding, both by the owner and the agent, of the appointment of the latter, and provided such notice be verified on the oath of the auctioneer, and the fairness of the transaction, to the best of his knowledge and belief. And by statute 28 Geo. 3, c. 37, s. 20, the notice to the auctioneer is required to be in writing; but by 42 Geo. 3, c. 93, a notice by the steward or known agent of the owner is sufficient. And by 19 Geo. 3, c. 56, s. 11, if any sale by auction of estates or goods shall be rendered void, by the person for whose benefit such estate or goods were sold having no title, the *Commissioners of Excise*, or *Justices of Peace*, are authorized to relieve the party from their payments (*r*).

Where the agent of the owner, at an auction for the sale of an estate, put it up in five lots, at a certain sum, and no person bidding for it, he put it up in two; and still no person bidding, he put it up in one; and no person then bidding, the estate was withdrawn from sale, it was held that this was not a *bidding* of the owner by an agent, so as to subject the party to the payment of the auction duty in default of a notice in writing to the auctioneer, previous to the auction, of such agency (*s*).

The auction-duties which are levied under the authority of various acts of parliament do not extend

(*r*) See 51 Geo. 3, c. 95, s. 1.

(*s*) *Cruso* v. *Crisp*, 3 East, 337.

to sales under order of the *Commissioners of Woods, Forests, and Land Revenues* belonging to the Crown (*t*): and the duties on sales by auction for the benefit of the growers, or first purchasers of sheeps wool, are now reduced to the sum of 2 *d.* on every 20 *s.* purchase (*u*).

CHAP. VI.

Of Rescinding Contracts.

THE parties to a contract of sale may at any time rescind it, either in whole or in part, unless by the act of annulling the contract they affect the rights of third persons. One of them cannot, without the assent of the other, rescind an absolute contract of sale; but it often happens that an agreement of this sort is entered into, subject to a condition which one of the parties alone may take advantage of; and in such cases, it is in his power to rescind the contract without the concurrence of the other contracting

(*t*) 55 Geo. 3, c. 55, s. 12.

(*u*) 55 Geo. 3, c. 142, s. 1. It is not within the scope of this treatise to state the duties and liabilities of auctioneers which have been created by different acts of parliament. The reader who wishes for further information on this subject, may consult the following statutes: 17 Geo. 3, c. 50; 19 Geo. 3, c. 56; 28 Geo. 3, c. 37; 29 Geo. 3, c. 63; 32 Geo. 3, c. 11; 36 Geo. 3, c. 123; 37 Geo. 3, c. 14; 38 Geo. 3, c. 54; 41 Geo. 3, c. 42, 91; 42 Geo. 3, c. 93; 43 Geo. 3, c. 69, 130; 45 Geo. 3, c. 30, Sched. A.; 47 Geo. 3, st. 2, c. 65.

party. Thus, in an action for money had and received, brought by the plaintiff to recover ten guineas which he had paid to the defendant for a one-horse-chaise, and harness, on condition to be returned in case the plaintiff's wife should not approve of it, paying 3 *s.* 6 *d.* a day for the hire of it, a question arose, whether the contract had been rescinded by the plaintiff returning the chaise at the end of three days (his wife not having approved of it), and tendering the hire of 3 *s.* 6 *d.* per day at the same time, which the defendant had refused to accept, and had also refused to return the money. The Court considered the contract at an end by the return of the chaise, and, therefore, that the plaintiff was entitled to recover the money paid by him to the defendant in this form of action (*a*). It is, however, incumbent on the party rescinding a contract to do so within a reasonable time; therefore, in a case tried before Mr. *Justice Buller*, on a warranty of a pair of horses, that they were five years old, when they turned out in fact to be only four, and they were not returned within a reasonable time, the learned Judge ruled, that the plaintiff had not rescinded the contract, and that he could only recover damages, and then the question was, what was the difference in value between horses four and five years old (*b*).

It was stated by *Lord Chief Justice Holt*, in a case tried before him at *Nisi Prius* (*c*), "that though

(*a*) *Towers* v. *Barrett*, 1 T. Rep. 133. See *Weston* v. *Downes*, Dougl. 23; *Cooke* v. *Munstone*, 1 New Rep. 351.

(*b*) 1 T. Rep. 136; *Fisher* v. *Samuda*, 1 Campb. 190, accord.

(*c*) *Langfort* v. *Admix. of Tiler*, 1 Salk. 113.

where earnest is paid, the vendor cannot sell the goods to another without default in the vendee, yet that if the vendee, after being requested by the vendor, do not pay for the goods, and take them away in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to another person;" and this *dictum* is quoted by *Lord Ellenborough* (apparently with approbation,) in the case of *Hinde* v. *Whitehouse* (*d*); it seems, however, inconsistent with the doctrine laid down by the last-mentioned noble and learned Judge, in a case which has been already referred to (*e*), where his Lordship says, "That the buyer's neglect to take away the goods in a reasonable time does not entitle the seller to put an end to the contract."

An action for money had and received was brought under the following circumstances: On the 6th of *June* 1791, the defendant agreed to sell to the plaintiff all his cord-wood at a certain price. The custom was for the seller to cut off the boughs and trunks, and then to cord the wood, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut sixty cords, ten of which he corded, and the plaintiff re-corded half a cord, and measured the rest. On the 8th of *March*, 1792, the plaintiff paid the defendant part of the price; but the defendant neglecting to cord the rest of the wood, the plaintiff brought his action to recover back the sum paid, as having been paid on a contract which had failed. Mr. *Justice Lawrence*, before

(*d*) 7 East, 571.
(*e*) *Greaves* v. *Ashlin*, 3 Campb. 426, *ante*.

whom the cause was tried, was of opinion that as it was owing to the fault and negligence of the defendant, that the contract, which was entire, was not carried into execution, the plaintiff was at liberty to consider the contract at an end, and recover back the money he had paid, the consideration having failed; and that what the plaintiff had done could not be considered as an execution of the contract in part: and the Court of *King's Bench* agreed with the learned Judge in that opinion (*f*). But where a contract is rescinded, the parties must be put in the same situation in which they stood at the time the contract was entered into; and if circumstances have been so altered as to prevent their being placed *in statu quo*, the party who might otherwise have rescinded the contract will not be allowed to do so. This rule was laid down by the Court of *King's Bench*, in a case in which the following facts were proved: An agreement was made between the plaintiff and the defendant, whereby the latter, in consideration of 10*l*. to be paid at the time of executing the lease after mentioned, and for other considerations therein stated, agreed, that within ten days from the date thereof he would grant the plaintiff a lease of the premises for a certain term, at a certain rent; and the defendant agreed at his own expense to make certain alterations in the premises, and that the premises, fixtures, and things, should at the time of executing the lease, be put in complete repair; and the plaintiff, *in consideration of the aforesaid* (*g*), agreed to accept the

(*f*) *Giles* v. *Edwards*, 7 T. Rep. 181.

(*g*) So expressed in the agreement.

lease, and pay the rent. The plaintiff took immediate possession of the premises, and paid the 10*l.* at the same time, in confidence that the alterations and repairs stipulated for would be done within the ten days; but that period, and some days after, having elapsed, and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default; and he brought the action to recover back the money he had paid. *Lord Ellenborough*, however, thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement; and therefore directed a nonsuit. On a motion for a new trial in the *King's Bench* the Court refused to grant it; and *Lord Ellenborough* distinguished the case from that last mentioned, saying, that "there, by the terms of the agreement, the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the lease executed. The plaintiff there had no opportunity by the terms of the contract of making his stand, to see whether the agreement were performed by the other party before he paid his money, which the party in this case had; but, instead of making his stand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waved his right, and voluntarily paid the money; giving the defendant credit for his future performance of the contract; and afterwards continued in possession notwithstanding the defendant's default. Now, where a contract is to be

rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part-execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done, and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be got rid of; the parties cannot be placed *in statu quo* (*h*)."

In sales by auction, the contract is not complete till the hammer is knocked down, before which time a bidder may always retract his bidding (*i*).

Where goods are sold in the city of *London* by a broker, to be paid for by a bill of exchange, the seller has a right to annul the contract within a reasonable time if he is not satisfied with the sufficiency of the buyer (*k*).

Where goods were sent by *A.* to *B.* by a carrier, pursuant to the order of *B.*, and *B.* before the goods reached him refused to accept them, and after some communication between *A.* and *B.* they agreed that *C.* should take the goods, and afterwards *B.* made an assignment of all his effects for the benefit of his creditors, but refused to include the goods in the assignment, the assignees of *B.* having induced the carrier to deliver the goods to them, an action of trover was brought against them by *A.* for the goods, and he was held entitled to recover (*l*).

(*h*) *Hunt* v. *Silk*, 5 East, 449.

(*i*) *Payne* v. *Cave*, 3 T. Rep. 148.

(*k*) *Hodgson* v. *Davies*, 2 Campb. 530.

(*l*) *Lovat* v. *Parsons*, Cowp. 61.

We will now state some important cases in which the buyer, being in a state of insolvency, has returned the goods to the seller, with an intention of putting an end to the contract, and thereby preventing the seller from being deprived of his goods, when it was not in the purchaser's power to pay for them. The cases on this subject are not quite consistent, but perhaps on a consideration of the whole of them, it may not be difficult to discover under what circumstances a person in a state of insolvency is allowed so to rescind a contract of sale.

In an action of trover by the assignees of bankrupts the following facts were proved in evidence: The defendants sold goods to the bankrupts on the seventh (*a*) of *April*, before their bankruptcy, and sent them into the country by order of the bankrupts. The bankrupts gave credit for the goods to the defendants in their books. On the 18th of *May*, the bankrupts, without the order or knowledge of the defendants, sent the goods to one *Penhallow*, for the defendants use. On the 4th of *June*, the purchasers became bankrupts; and on the 6th of *June*, they wrote a letter to the defendants, stating that their affairs were in a declining state, and that they thought it not reasonable, that the goods should go to satisfy their other creditors, and therefore had not entered them in their books, but left them with *Penhallow*, who had orders to deliver them to the defendants. On the 9th of *June*, the commission of bankruptcy issued, and the effects of the bankrupts were assigned

(*m*) So stated in Strange. The report of the case in 11 Mod. states, that the goods were sent on the *seventeenth*.

to the plaintiffs. The defendants received the letters on the 13th of *June*, which was the first notice they had of the delivery of the goods to *Penhallow*; and as soon as possible they signified their assent to take the goods again. It was held by the Court, that the property was altered, and revested in the defendants by the delivery to *Penhallow*, and judgment was given for the defendants (*n*). *Lord Mansfield*, in a subsequent case (*o*), speaking of this decision, said, that with respect to the case of *Atkin* v. *Barwick*, the judgment seemed to be right, but the reasons wrong; and that the true ground of the decision was, that the trader very honestly *refused to accept* the goods, and *returned* them. It seems, however, impossible to reconcile this statement with any of the reports of the case, all of which state an acceptance of the goods by the buyers, and a delivery of them afterwards to a third person for the use of the defendants.

Goods had been sold to *Dewhurst*, who lived and carried on trade in *America*, but had a house of business in *London*, conducted by *Hill*, his clerk, and the goods had been delivered to *Hill*, in *London*, on the 3d and 5th of *May*, in order to be shipped by him to *Dewhurst* in *America*; and they were sent by *Hill* to a packer, to be packed for that purpose. On the 9th of *April*, *Dewhurst* wrote a letter to *Hill*, which was received by the latter on the 18th of *May*, in which he stated his insolvency, and directed, that if any goods had been purchased by

(*n*) *Atkin* v. *Barwick*, Strange, 165; 10 Mod. 431, S. C.; 11 Mod. 295, S. C.; Fort. 353, S. C.

(*o*) *Harman* v. *Fisher*, Cowp. 125.

Hill for him, they should be returned. This letter was shown by *Hill* to *Salte*, the seller of the goods, on the 18th of *May*, about nine o'clock in the evening, who then informed *Hill* that he was ready to take back the goods. On the same day, and on the next day, the goods were attached in the hands of the packer, by several other creditors of *Dewhurst*. The goods having been demanded by *Salte*, the seller, and the packer refusing to deliver them up, he brought an action of trover against the packer for the goods. The Court considered that the contract was here put an end to by consent of both parties, and that the property in the goods had revested in the plaintiff (*p*). Another case came soon after, before the Court, respecting goods sent to the same person *Dewhurst*, which had also been sent to the same packer. On the receipt by *Hill*, of the letter of *Dewhurst* above mentioned, on the 18th of *May*, he applied to *Scott*, one of the vendors of the goods, but *Scott*, supposing that *Hill* was not authorized in law to deliver the goods back to him, attached them on the next day in the hands of the packer. It was held by the Court that the attachment by the vendors was to be considered as an election by them not to rescind the contract, and consequently, that the goods did not revest in the vendor (*q*).

It is necessary to observe, that the case of *Salte* v. *Field* was decided on the ground, that the authority of the agent had been put an end to by his principal

(*p*) *Salte* v. *Field*, 5 T. R. 211. See *Parry* v. *Dawson*, Anstr. 710.

(*q*) *Smith* v. *Field*, 5 T. R. 402.

before the goods were purchased by the agent, and that a delivery to the agent did not, under those circumstances, amount to a delivery to the principal. But where the contract has been completed by a delivery of the goods to the purchaser, he cannot afterwards, on account of being in a state of insolvency, rescind the contract, though the seller agree to take back the goods, because it would be to the prejudice of the other creditors of the purchaser (*r*). It is observable, that *Lord Kenyon*, speaking in this case of the decision of the Court in *Atkin* v. *Barwick*, adopts the idea thrown out by *Lord Mansfield*, that the vendee had, before the arrival of the goods, refused to accept them; and on their arrival had sent them to a friend of the consignor for his use. This important fact of the refusal of the vendee, *previously* to the arrival of the goods, to accept them, does not appear in either of the reports. If the fact were really so, there seems no difficulty in sustaining the case; if, on the other hand, the sale was actually completed by the delivery of the goods to the purchaser before any dissent to the contract expressed on his part, it appears quite impossible to reconcile that decision with *Barnes* v. *Freeland*. It is also to be observed, that Mr. *Justice Chambre*, in a case which will be next adverted to, said, that perhaps, if a case precisely similar to *Atkin* v. *Barwick* were now to arise, it would not receive the same decision. The circumstances there were as follow: Goods had been consigned to *A*. who, previously to receiving them, being in a

(*r*) *Barnes* v. *Freeland*, 6 T. Rep. 80: and see *Harman* v. *Fishar*, Cowp. 123; *Haswell* v. *Hunt*, 5 T. R. 231.

state of insolvency, sent a letter to the seller revoking the order; after which, the goods arrived at a wharf for *A.*, and on the seller claiming the goods, the wharfinger refused to deliver them to him, and claimed a general lien upon them for a balance due from *A.* to him. The Court ruled, that by the countermand the goods re-vested in the seller (*s*).

Where, by the course of dealing between *A.* and *B.* the latter was allowed an option either to retain or to return the goods sent by the former, *A.* sent goods to *B.* which arrived on the 19th of *February*. *B.* after keeping them in his possession till *March* the 4th, sent part of them back on that day, and the remainder on the next day, he being at that time in a state of insolvency, and committing an act of bankruptcy on the evening of the 5th of *March*, after the goods were returned. The Court held the transaction an illegal preference in contemplation of bankruptcy, and that the property in the goods remained in *B.* notwithstanding the return, and on his bankruptcy vested in his assignees (*t*).

It is not to be inferred from the cases referred to above, that the mere circumstance of the vendee believing himself to be insolvent, will take away his authority to rescind the contract, and return the goods. It is a question for the Jury, whether the return was made *bonâ fide*, or from any motive of voluntary and undue preference, and if done *bonâ fide* the property will revest in the seller by the return (*u*).

(*s*) *Richardson* v. *Goss*, 3 Bos. & Pul. 119.

(*t*) *Neate* v. *Ball*, 2 East, 117.

(*u*) *Dixon* v. *Baldwen*, 5 East, 175.

A material alteration of the sale-note, made after the sale by the broker, at the instance of the seller, without the knowledge of the buyer, will so far vitiate the contract as to prevent the seller suing on it (*x*).

The conclusion to be drawn from the cases cited above seems to be this: that a purchaser who is in a state of insolvency may, at any time before goods come into his actual possession, rescind the contract, with the consent of the seller; but when goods have been actually received into the possession of the purchaser he cannot rescind the contract, and by returning them to the seller prevent their being applied in satisfaction of his general debts.

CHAP. VII.

Of the Transfer of the Property in the thing sold from the Vendor to the Vendee.

THE next subject of inquiry will be at what time, and by what means, the property in the thing sold is transferred from the seller to the purchaser, and becomes vested in the latter. The most simple mode of transfer is by the actual delivery of the goods sold by the vendor to the vendee; but it is often a matter of some difficulty to ascertain what particular facts amount to a delivery. It is not in all cases necessary that there should be an actual delivery to the vendee

(*x*) *Powell* v. *Divett*, 15 East, 29.

of the goods sold, in order to vest the property in him; for if the goods be ponderous, and on that account not easily transferred from hand to hand, or if there be any particular reasons why there should not be an actual delivery of the whole, the delivery of a part, or of the key of a warehouse in which the goods are contained, as a symbol or representative of the goods, will have the same effect in law as the actual delivery of the whole; the delivery of goods to a carrier, for the purchaser, will, in general, vest the goods in the purchaser; and an indorsement of a bill of lading will have the like effect as to the person to whom it is indorsed. These different modes of transferring the property in goods will be considered in the present chapter; but we will first turn our attention to certain cases, in which the seller is said in law to have a *lien* on the goods, that is, a right to detain them till the buyer pays the price.

1. When a contract for the sale of goods is completed by the assent of both parties, the property in the goods is so far transferred to the vendee as to give him a complete right to them on payment of the price agreed upon; but he cannot take the goods until he tenders the price to the vendor. If he tender the price, and the vendor refuse it, the vendee may then seize the goods, or have an action against the vendor for detaining them. The payment of part of the price by way of *earnest* will also vest the property in the thing sold. Thus, if a man sell a horse to another, and receive part of the price, and the horse die while in the possession of the vendor before delivery to the vendee, or payment of the remainder of the purchase-money, still the vendor is

entitled to the payment of the price, because the payment of the earnest vests the property in the vendee (*a*). The payment of earnest, however, only binds the bargain, and does not restrain the right of the vendor to demand payment of the price by the vendee before he parts with the goods, unless it has been agreed upon between the parties that a certain time shall be given for payment.

The following distinctions are laid down in a work of authority (*b*): "If a man, by word of mouth, sell to me his horse, or any other thing, and I give him, or promise him, nothing for it, this is void, and will not alter the property of the thing sold; but if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or all, or any part of the money is paid in hand, or I give earnest-money (albeit it be but a penny) (*c*) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a good bargain and sale of the thing to alter the property thereof; and, in the first case, I may have an action for the thing, and the seller for his money: In the second case I may sue for and recover the thing bought; in the third, I may sue for the thing bought, and the seller for the residue of the money: In the fourth case, where earnest is given, we may have reciprocal remedies one against another; and in the last case, the seller may sue for his money."

(*a*) 2 Bla. Com. 448.
(*b*) Shep. Touchstone, 224.
(*c*) See *Bach* v. *Owen*, 5 T. R. 409, accord.

The reader will observe, that the passage just quoted states the common law relative to the subject of the sale of personal property. The alterations which have been made by the statute of frauds have been shown in a former chapter, and need not be repeated here. If a man offer money for goods in a market, and the seller agree to take his offer, and, while the buyer is telling out the money as fast as he can, the seller sell the goods to another, the buyer may, upon payment, or tender and refusal of the price agreed upon, take the goods (*d*).

2. Where there has been a *part-payment* of the price it will not take away the vendor's lien on the goods, but will only diminish it *pro tanto* (*e*). If a future day of payment be fixed by the contract, the seller thereby waves his lien; the buyer has a right to take the goods immediately; and the seller, in default of payment of the price at the appointed time, has a remedy by action against the buyer (*f*).

When the seller parts with the possession of the goods he loses his lien, and it will not be revived by the insolvency of the purchaser, who has not paid for the goods (*g*). Where goods are sold, to be paid for on delivery, and on the vendee neglecting to take away the goods and pay the price, the vendor brings an action against the vendee for goods bargained and sold, and obtains a verdict: until the amount is paid,

(*d*) Shep. Touchstone, 225. See also Roberts on the Statute of Frauds, 165—170.

(*e*) Per *Lawrence*, J. *Feise* v. *Wray*, 3 East, 102.

(*f*) Dyer, 30. a.

(*g*) *Godfrey* v. *Furzo*, 3 P. Wms. 185; and see the cases cited there in n. 1.

the vendor retains his lien on the goods, and they cannot be taken in execution by the sheriff in an action brought by a creditor of the vendee against him (*h*).

A policy-broker, who had a general lien on the policy of insurance, having parted with it, afterwards regained possession of it, and it was held that his lien thereby revived (*i*). The law, probably, would be the same if a vendor of goods, who had suffered them to go out of his possession, should recover the possession of them before payment, though no express decision seems to have taken place on the point.

A principal has a lien on goods in the hands of his factor, and also in the hands of a third person to whom the factor disposes of the goods with notice; but if the factor sell the goods *bonâ fide, at sea*, though no possession be given, the vendee may hold them against the vendor (*k*).

It seems doubtful whether, on a sale of goods and part-delivery, and on the price being paid for that part, the vendor's lien remains on the part undelivered for the residue of the price (*l*).

It is reported to have been once said by *Lord Mansfield* (*m*), that whoever supplies a ship with necessaries has a security on the specific ship; but it

(*h*) *Houlditch* v. *Desanges*, 2 Stark. 337.

(*i*) *Whitehead* v. *Vaughan*, Co. Bt. Laws, 442.

(*k*) *Wright* v. *Campbell*, 4 Burr. 2051, and 1 W. Bla. 628. The reason of this distinction will appear in the course of the present chapter.

(*l*) See Dyer, 29. b. *Hanson* v. *Meyer*, 6 East, 614, and the cases there cited.

(*m*) In *Rich* v. *Coe*, Cowp. 639.

is quite clear that this is a mistake, and that by the law of *England* no such lien can be supported (*n*).

3. There is often considerable difficulty in ascertaining the particular period when the property in goods sold passes from the vendor to the vendee; and what facts amount to an actual delivery of the goods. The best mode, perhaps, of understanding this subject, will be to enumerate the various cases on it which are to be found in the reports; and to endeavour to discover, as we go along, the principles on which they were decided.

Where the plaintiff bought some plate at the shop of the defendant, a silversmith, and the defendant, by the plaintiff's directions, delivered the plate to an engraver, to engrave the plaintiff's arms on it, both parties directing the engraver to bring back the goods to the defendant, who was to pay for the engraving; the Court held, that the delivery of the goods to the engraver did not vest the property in the plaintiff (*o*). It is clear that this could not be a delivery to the plaintiff, unless the engraver could be considered as his servant or agent; but there was no pretence for considering him in that situation, as he was employed by the defendant, and not by the plaintiff, and as the plate was to be returned to the defendant, who was to pay for engraving it.

The delivery of part of a cargo of goods, where there appears no intention, either previously, or at

(*n*) See the cases on this subject collected, and the subject conclusively settled, in Lord Chief Justice Abbott's Treatise on the Law of Shipping, 3d edition, 134—144.

(*o*) *Owenson* v. *Morse*, 7 T. R. 64.

the time of the delivery, to separate that part from the rest, is in law a delivery of the whole cargo (*p*). And where a quantity of bacon had been sold at one entire price, and lodged at a wharf, and possession given by the wharfinger to the vendee four days after the sale, when the vendee weighed the whole of the bacon, and took away part of it, it was held that the property vested in the vendee, though by the custom of the trade the vendor was to pay the charges of warehousing for fourteen days after the sale (*q*).

Under a contract of sale, by which the vendee agreed to purchase all the starch of the vendor lying in the warehouse of a third person, at a certain price, the starch being then in papers, and the weight unascertained, and it was agreed that the weight should be afterwards ascertained; after which the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver the starch to the vendee, and a part of the starch was accordingly afterwards weighed and delivered, the Court held that the weighing and delivery of part of the starch did not transfer to the vendee the property in the rest, which had not been weighed and delivered (*r*). This case was distinguished from *Slubey* v. *Hayward* (*s*), and *Hammond* v. *Anderson* (*t*), on the ground, that the weighing of the starch was, by the particular terms of the contract, in the nature of a condition or preliminary act, which was necessarily to precede the absolute vesting

(*p*) *Slubey* v. *Hayward*, 2 H. Bla. 504.

(*q*) *Hammond* v. *Anderson*, 1 New Rep. 69.

(*r*) *Hanson* v. *Meyer*, 6 East, 614.

(*s*) Ante, (*p*).

(*t*) Ante, (*q*).

of the property contracted for by the buyer. And *Lord Ellenborough*, in delivering the judgment of the Court, lays down a rule, which, if duly attended to, and strictly and constantly kept in view, will safely guide us through the labyrinth of cases which are to be found in the reports on this subject. "If," says his Lordship, "any thing remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer."

In another case, where a quantity of turpentine in casks was sold by auction, in lots, at a certain price *per cwt.*, each cask, except the two last, being marked at a certain weight at which they were to be taken by the buyer, the two last lots being reserved to fill up the rest, and being on that account sold at uncertain quantities, and after the sale some of the casks were filled up, but the filling of the rest was not completed, when the whole was consumed by fire; it was decided that the property in those casks which had been filled up was transferred to the buyer, but that those which had not been filled up still remained the property of the seller (*u*).

In the subsequent case of *Whitehouse* v. *Frost* (*x*), which was an action of trover brought by the assignees of *Townsend*, a bankrupt, the facts, as far as they relate to the subject now in view, were as follows: Two of the defendants, of the name of *Frost*, were merchants and partners in *Liverpool*, and the

(*u*) *Rugg* v. *Minett*, 11 East, 210.

(*x*) 12 East, 614.

other defendants, *Dutton* and *Bancroft*, were also merchants and partners at the same place. On the 7th of *February* 1809, *Townsend* purchased from the defendants, *J.* & *L. Frost*, ten tons of oil, for which he was to give his acceptance, payable four months after date, and a bill of parcels was rendered to *Townsend* by the *Frosts*, which stated the oil to be in *Staniforth's* cistern, and at *Townsend's* risk. The ten tons of oil, at the time of the sale, were part of forty tons lying in one of the cisterns in the oil-house at *Liverpool*, the key of which cistern was in the custody of the other defendants, *Dutton* and *Bancroft*, who had before that time purchased the forty tons of oil from another merchant. *Dutton* and *Bancroft* had afterwards sold the ten tons in question to the *Frosts*. *Townsend* received from the *Frosts*, on the day on which he bought the oil, an order on *Dutton* and *Bancroft* to deliver the oil to him, *Townsend*. The order was accepted by *Dutton* and *Bancroft*, and an acceptance at four months, in pursuance of the contract, was given by *Townsend* to the *Frosts*. *Townsend* never demanded the oil of *Dutton* and *Bancroft*. About three months after the purchase of the oil, a commission of bankrupt issued against *Townsend*, and the plaintiffs were appointed his assignees. At the time of the bankruptcy the oil was still lying in the cistern, mixed with the other oil. The question which was discussed before the Court was, whether these facts amounted to a delivery of the oil to *Townsend*, so as to vest the property in him. It was urged on the part of the defendants, that *something remained to be done*, namely, the separation of the ten tons from the general mass of oil in the

cistern, before the property in the oil could be transferred from the vendor to the vendee; but Mr. *Justice Le Blanc* said, that the objection only applied where something remained to be done as between the buyer and the seller, or for the purpose of ascertaining either the quantity or the price; neither of which remained to be done in this case; and that therefore, though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet, as between him and his vendors, nothing remained to perfect the sale: and the Court held, that the property had vested in *Townsend* before his bankruptcy. But where fifty out of ninety tons of *Greenland* oil were sold, and an order was given by the seller for the delivery of the oil to the buyer, and it was found as a fact, in a case reserved for the opinion of the Court, that before *Greenland* oil is delivered, it is the constant custom to have the casks searched by a cooper employed by the seller, and for a broker, on behalf of both buyer and seller, to attend to make a minute of the foot-dirt and water in each cask, and that then each cask is filled up by the seller's cooper at the seller's expense, and delivered in a complete state, containing the quantity sold, and those things had not been done, the Court held, that the property in the oil did not vest in the vendee (*y*). Two cases have been since decided in the Court of *Common Pleas*, in which the case of *Whitehouse* v. *Frost* has been expressly overruled. The first of these cases arose

(*y*) *Wallace* v. *Breeds*, 13 East, 522.

on a sale of sugars, which the defendant had contracted to sell to *K.*, and which had afterwards been sold by *K.* to the plaintiff, the defendant assenting to the re-sale; but the sugar had not been delivered, or separated from other sugars in the defendant's possession. The Court held that the plaintiff could not recover in trover for these sugars against the defendants, the original vendors (*z*). In the other case it was held, that by a sale of oil out of a merchant's stock, consisting of several large quantities, in different cisterns, no property passed without a separation of the part sold from the rest of the stock (*a*). Mr. *Justice Heath*, in the two last cases, referring to the case of *Whitehouse* v. *Frost*, asked, "If ten tons had leaked out of the cistern, to whom those ten tons should be deemed to belong? and suppose a part of the oil were lost or burnt, who is to know whether it is the vendor's or the vendee's?"

The two last-cited cases seem more agreeable to the general current of authorities than the case of *Whitehouse* v. *Frost*. With respect to the facts of that case, it appears perfectly clear, that at the time the oil was sold by the *Frosts* to *Townsend*, the property in it had not passed from *Dutton* and *Bancroft* to the *Frosts*, because *something remained to be done between the buyer and the seller*, that is to say, the measuring and separating of the ten tons of oil from the larger quantity in possession of *Dutton* and *Bancroft*. If then the property had not vested in the *Frosts*, could the sale by them to *Townsend*

(*z*) *Austen* v. *Craven*, 4 Taunt. 644.

(*a*) *White* v. *Wilks*, 5 Taunt. 176.

transfer it to him? Could they do more than assign to him the right which they possessed to have the oil separated and delivered to them? The property in the ten tons of oil did not vest in the *Frosts*, because there was no specific appropriation of any particular part of it; and the same objection applies with equal force to the claims of *Townsend*'s assignees. The sale was of ten tons of oil generally, and not of any particular ten tons. The whole quantity consisted of forty tons. If *Dutton* and *Bancroft* had thought proper to draw off the oil from the cistern at four different times, ten tons at a time, they might have delivered either of those lots to *Townsend*, without any breach of the original contract with the *Frosts*. No part of the oil then being particularly appropriated to *Townsend*, there seems not to have been that separation from the general mass, and distinct specification and delivery which the law requires, in order to vest the property of goods sold in the vendee.

It has since been held, that on a sale of a certain quantity of hemp, forming part of a larger quantity, the property does not pass from the vendor to the vendee till the hemp is weighed off (*b*). And it being the custom in the sale of goat-skins for the seller to count the number of the skins in each bale; where on a sale of goat-skins, they were consumed by fire before they were counted, it was held to be the loss of the seller (*c*).

Where a certain number of dollars was transmitted

(*b*) *Shepley* v. *Davis*, 5 Taunt. 617; *Busk* v. *Davis*, 2 Ma. & Selw. 397, accord.

(*c*) *Zagury* v. *Furnell*, 2 Campb. 240.

from *Buenos Ayres*, to the plaintiff in *England*, in a barrel, which contained a greater number, though there was no specific appropriation of any particular dollars to the plaintiff, it was nevertheless held, that he might maintain trover against a person who wrongfully detained the whole of the dollars, which necessarily included his share, the Chief Justice observing, that as the dollars were all of the same value, it could not be a question what particular dollars belonged to the plaintiff (*d*).

Timber, the property of *A*. and lying at his wharf, is sold by him to *B*. who afterwards sells it to *C*. The agent of *C*. is sent to the wharf, and informs *A*. that *B*. had sold the timber to *C*., on which *A*. says, "it is very well," and permits the agent to mark the timber for *C*. The Court held this a perfect delivery to *C*. (*e*). It has also been decided in the House of Lords, that the change of mark from *A*. to *B*. on goods lying in a warehouse, by direction of the parties, operated as an actual delivery of the goods (*f*); and if goods which are ordered in a shop, and to be left till called for, are weighed or measured, that will be a sufficient delivery (*g*); and we have already seen that on a sale of horses, when the buyer requested the seller to permit the horses to remain at livery with him, the property in the horses was held to vest in the buyer from the time of the seller's assenting to the horses so remaining (*h*). It must, however, be

(*d*) *Jackson* v. *Anderson*, 4 Taunt. 24.

(*e*) *Stoveld* v. *Hughes*, 14 East, 308.

(*f*) Per *Lord Ellenborough*, 14 East, 312.

(*g*) Per *Heath*, J. 1 Taunt. 459.

(*h*) *Elmore* v. *Stone*, 1 Taunt. 458, ante, 46.

remembered that this last-mentioned case has very lately been referred to with some disapprobation by Mr. *Justice Bayley* (*i*).

A particular parcel of goods in the possession of a warehouseman is sold at so much *per cwt.*, the weight of the whole being uncertain, to be paid for by a bill of exchange. The vendor gives the vendee an order on the warehouseman for weighing and delivering the goods. It was held by *Lord Chief Justice Gibbs*, at *Nisi Prius*, that the property did not pass to the vendee, as *something still remained to be done*, and that it made no difference that the whole of the goods was sold, the principle being, that while any thing remains to be done to ascertain the price, the possession is not transferred to the purchaser. Till the goods were weighed, the bill of exchange which was to be given in payment for them could not be drawn (*k*).

It was agreed between the plaintiff and *Daniel*, before the bankruptcy of the latter, that *Daniel* should purchase of the plaintiff all the light gold coin of the realm which the plaintiff should send to him at a certain price, and that the plaintiff should draw bills of exchange, payable at two months, on *Daniel*, for the price. It was also further agreed, that *Daniel* should accept other bills of exchange for the plaintiff's convenience, and that the plaintiff should remit value to *Daniel* to the amount of such acceptances, to answer, together with such light gold, for the different bills so drawn on *Daniel*. After they had acted under

(*i*) *Howe* v. *Palmer*, 3 Barn. & Ald. 321, ante, 46.

(*k*) *Withers* v. *Lyss*, 4 Campb. 237.

this agreement for some time, *Daniel* became a bankrupt, being under acceptances for the plaintiff to a considerable amount. The plaintiff (not being aware of the bankruptcy,) sent a parcel of light gold to *Daniel* to discharge the acceptances, which was taken possession of by *Daniel's* assignees. The plaintiff afterwards paid *Daniel's* acceptances, and brought an action of trover for the bills of exchange and the light gold. The majority of the Judges of the *King's Bench* held, against the opinion of Mr. *Justice Buller*, that the plaintiff was entitled to recover, and the judgment was afterwards unanimously affirmed in the *Exchequer Chamber* (*l*). In giving his judgment in this case, *Lord Kenyon* says, "It never yet has been decided, whether or not a person who, acting under a previous agreement, sends goods to another against whom a commission of bankrupt has been issued at the time, and who is not only an insolvent person, but disabled by the laws of his country from dealing at all, can recover these goods again, under an idea that the situation of that other, with whom he meant to deal, was so altered that it could not be considered to be a contract with him." The case seems to have been decided on the ground that the goods had been sent for a particular purpose, the covering of *Daniel's* acceptances, to which purpose they could not, from the circumstances of his inability to pay the acceptances, and the subsequent payment by the plaintiff, be applied. Many points of law of great difficulty arose in the course of the discussion, but they were not settled by the decision of the Court, the principle

(*l*) *Tooke* v. *Hollingworth*, 5 T. Rep. 215, and 2 H. Bla. 501.

of which seems to be what was clearly and distinctly expressed by Mr. *Justice Ashhurst*, that "where goods are sent by one man to another for a particular purpose, and they have not been (and cannot be) applied to that purpose, the former may recover them back again."

4. When, from particular circumstances, an actual delivery of goods sold cannot be made by the seller to the purchaser, a symbolical delivery of some particular thing, as representing the commodity sold, will vest the property in the purchaser equally as an actual delivery. Thus, where an engineer contracted with a canal-company to build locks and bridges upon their canal, and for that purpose brought materials to the wharf of the Company on the canal, after which, being in arrear to the Company, he executed a bill of sale to them of the materials, and made a symbolical delivery of a halfpenny, the Court held that the bill of sale was not fraudulent, but that the property was thereby transferred to the Company; for as the goods were already on the premises, the only mode of giving possession of them was by such a symbolical delivery as had actually taken place (*m*).

A. agrees to sell goods to *B.* who pays a sum of money to bind the bargain; the goods are packed up in cloths furnished by *B.* and deposited in a building belonging to *A.* till *B.* shall send for them, but *A.* declares at the same time that they shall not be carried away till he is paid; this is not a delivery to vest the property in *B* (*n*).

(*m*) *Manton* v. *Moore*, 7 T. R. 67.

(*n*) *Goodall* v. *Skelton*, 2 H. Bla. 316.

On a sale of sugars in the king's warehouse, under the locks of the king and the owner, from whence they could not be removed till the duties were paid, and which were agreed to be taken "as they now are at the king's weights and tares, with the allowance of draft, or re-weighed, giving up the draft; *to be at the purchaser's risk from the time of sale*;" samples having been delivered and accepted by the purchaser as a part of his purchase, the property was held to vest immediately in the purchaser, though the king's duties, before the payment of which the goods could not be taken out of the warehouse, were to be paid by the seller (*o*).

Upon a submission to arbitration by a landlord and his tenant, the arbitrator awarded (among other things) that the tenant should give up the hay on the farm to the landlord, the latter paying the former a certain sum for the hay. It was held by the Court, that the property in the hay did not pass to the landlord by force of the award, on his tendering the sum directed to be paid, which the tenant refused to accept; but *Lord Ellenborough* observed, that "if the tenant had accepted the money tendered, that would have been a ratification of the award, and an assent on his part to the transfer of the property (*p*).

5. In deciding questions relating to the transfer of the property in goods sold from the seller to the buyer, the Courts will be disposed to give effect to those usages of trade which experience has shown to be convenient, even though they should be of no

(*o*) *Hinde* v. *Whitehouse*, 7 East, 558.

(*p*) *Hunter* v. *Rice*, 15 East, 100.

long standing. In a late action, brought to recover the value of thirty casks of coffee lying in the warehouses of the *West India* Dock Company, it appeared that the plaintiff had purchased the coffee under the following circumstances; the coffee had been purchased by *Roebuck*, with money advanced by the defendant; and for securing re-payment, *Roebuck* had transferred it, in the books of the *West India* Dock Company, into the name of *David Samuda*, in trust for the defendant, by way of pledge. *Roebuck* afterwards, on the 13th of *August*, agreed to sell the coffee to the plaintiffs, to be paid for in cash on the 17th of *August*; and on the 16th of *August*, he requested the defendant to give up to him the dock-warrants, or orders for the delivery of the coffee, which the defendant refused to do unless he were first paid his debt; whereupon *Roebuck* showed him 1,000*l.*, out of which, he said, the defendant should be paid; but that, for the sake of acquiring credit at his bankers, he wished to pay them this sum, and immediately to give the defendant a cheque upon them for 530*l.* the amount of the debt due to him. The defendant acquiesced, and took the cheque, and wrote at the foot of the delivery-notes his signature to an order for the delivery of the above-mentioned goods to ———, and gave them up on the same day to *Roebuck*, who, on the 16th, received of the plaintiffs the price thereof, and delivered to them the delivery-notes to be filled up by themselves, with their own or their agent's name, as the party to whom the goods were to be delivered. The cheque which the defendant had taken *Roebuck* immediately instructed his bankers not to pay; upon its dishonour, the defendant

before the delivery-notes had been presented at the *West India* Docks, gave notice there, and prevented the delivery of the goods to the plaintiffs, who on the 19th of *August* demanded the goods. The plaintiffs insisted that the property in the coffee was vested in them by the indorsement of the delivery-note, for that such was the custom of this trade, established ever since the *West India* Docks had been formed; and they proved that the practice prevails of transferring these documents from hand to hand, by indorsement, as a symbolical delivery of the property, to which the officers of the *West India* Docks pay attention and give effect; for that, upon the request of any holder of such delivery-notes, the Company will substitute for them new notes, deliverable to the holders of the old notes. It was also proved, that persons engaged in the trade, treat and consider these notes as passing the property by indorsement. The jury having found a verdict for the plaintiffs, the case came before the Court of *Common Pleas*, on a motion to set aside the verdict, and enter a nonsuit, which the Court refused to do. *Lord Chief Justice Dallas* said, "it is said that it would be inconvenient, if property may be transferred by these delivery-notes. The best test of their convenience is the use of them, which has obtained ever since these docks have been erected. Two witnesses, very conversant with this trade, stated that there was a general practice prevalent, to receive these warrants in the market, and to pay for the goods therein specified, without going to the Dock-house to examine whether any stop was put on them. Without saying that this is such a usage as to constitute a rule of law, there is, in the

particular case enough to show that there is no foundation for the observation, that the practice will be productive of inconvenience. It is enough, therefore, to say, that the persons who hold these notes have given a valuable consideration for them, and that, therefore, they are entitled to the property" (*q*).

After a contract for the sale of goods, and a written order to the wharfinger to deliver the goods, assented to by him, the property passes to the vendee, though no actual transfer be made in the wharfinger's books (*r*).

When goods are sold, to be paid for in thirty days, and if not carried away at the end of that time, warehouse-rent to be paid for them, the property in the goods vests absolutely in the purchaser from the moment of the sale, the agreement to give stowage-room for thirty days being introduced for the benefit of the buyer, and being part of the consideration for which the purchase-money is to be paid (*s*).

Goods being entered in the books of the *West India* Dock Company in the name of *A.* he receives the usual cheque for them, which, having sold the goods to *B.*, he indorses, and delivers to him; *B.* sells the goods, and delivers the cheque to *C.* on credit. On *C.*'s insolvency *A.* cannot lawfully take possession of the goods, although they have continued to stand in his name, and the cheque has not been lodged with the Dock Company (*t*). In this case the gentlemen

(*q*) *Zwinger* v. *Samuda*, 7 Taunt. 265; and *Holt's* N. P. R. 395. See *Lucas* v. *Dorrien*, 7 Taunt. 278; *Noble* v. *Kennoway*, Dougl. 510.

(*r*) *Lucas* v. *Dorrien*, 7 Taunt. 278; *Searle* v. *Keeves*, 2 Esp. 598, accord.

(*s*) *Phillimore* v. *Barry*, 1 Campb. 513.

(*t*) *Spear* v. *Travers*, 4 Campb. 251.

of the special jury observed, that in practice the indorsed dock-warrants and certificates are handed from seller to buyer as a complete transfer of the goods.

By the usage of trade at *Liverpool*, if goods are lying in a warehouse at the time when they are sold, the vendors pay rent for them for two months, if the vendee allows them to remain there so long; but this usage does not prevent the property vesting in the vendee immediately on the vendor giving the usual order to the warehouse-keeper to deliver the goods to the vendee (*u*).

A mere delivery of goods by the seller at a wharf for the purchaser, at which wharf he had on former occasions delivered goods for the same purchaser, is not sufficient to charge the purchaser, unless the seller procure them to be booked, or deliver them to some person authorized to receive them (*x*).

6. If an order be given to a tradesman *to make* goods for a customer, the property in the goods will not vest in the customer till they are actually finished; and it makes no difference that the purchaser has paid the whole price in advance (*y*).

7. The effect of a delivery of goods to a carrier to be carried to the vendee, in divesting the property of the goods out of the vendor, and vesting them in the vendee, is thus clearly stated by *Lord Alvanley* (*z*): "If a tradesman order goods to be sent by

(*u*) *Greaves* v. *Hepke*, 2 Barn. & Ald. 131.

(*x*) *Buckman* v. *Levi*, 3 Campb. 414.

(*y*) *Mucklow* v. *Mangles*, 1 Taunt. 318.

(*z*) *Dutton* v. *Solomonson*, 3 Bos. & Pul. 584. See *Vale* v. *Bayle*, Cowp. 294.

a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser (*z*); the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods, it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*." If, however, the consignor undertake by a particular agreement with the carrier to pay for the carriage of goods, he may support an action against the carrier for not delivering them (*a*). But if the vendor merely pay for the booking of the goods, he cannot maintain an action against the carrier for the loss of them (*b*).

The case of *Moore* v. *Wilson*, which is very shortly reported (*c*), and which was decided several years before the last-mentioned case, seems quite inconsistent with it. It was an action brought by the consignor against a carrier, for not safely carrying and delivering goods. The declaration stated, that the defendant undertook to carry the goods "for a certain hire and reward to be paid by the plaintiff." It was proved at the trial that the consignee had agreed with the plaintiff to pay for the carriage of the goods; and Mr. *Justice Buller*, thinking the variance fatal, nonsuited the plaintiff. A motion was made in the next term to set aside the nonsuit, and the same learned Judge said, that, on considering the question, he

(*z*) See *Anderson* v. *Hodgson*, 5 Price, 630.

(*a*) *Davis* v. *James*, 5 Burr. 2680.

(*b*) *Dawes* v. *Peck*, 8 T. R. 330.

(*c*) 1 T. R. 659.

found he had been mistaken in point of law; for that, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by the law liable. The other Judges agreeing, the rule for setting aside the nonsuit was made absolute. It is to be observed that this case, and that of *Davis* v. *James* (*d*), were cited, when the case of *Dawes* v. *Peck* (*e*) was discussed before the Court, and were distinguished from that case on the ground of a special contract having been entered into in those cases between the vendor and the carrier. That circumstance does certainly distinguish *Davis* v. *James* from *Dawes* v. *Peck*, and the two cases may well stand together; but in the case of *Moore* v. *Wilson* there is nothing said of any special agreement between the vendor and the carrier; for the agreement mentioned by Mr. *Justice Buller*, it is presumed, is merely the *implied* agreement resulting from the supposed common-law liability of the vendor to answer for the carriage. It seems impossible to suppose, that if a special agreement had been entered into between the vendor and the carrier, it should not have been mentioned by the reporters in their statement of the facts of the case, but should have been left to be collected from the very concise statement of the learned Judge. We conclude, therefore, that this case of *Moore* v. *Wilson*, being quite inconsistent with *Dutton* v. *Solomonson*, and *Dawes* v. *Peck*, cannot be considered as law at the present day.

(*d*) Ante, 157. (*e*) Ante, 167.

Though the seller is to pay the carrier for the carriage of the goods, the property vests in the buyer at the moment the goods are delivered to the carrier; and if any loss takes place he must sustain it (*f*). And where goods are sent abroad, the property vests in the consignee from the time they are put on board the ship (*g*).

8. We will now proceed to inquire concerning the effect of bills of lading (*h*), in transferring the property in goods. The effect of a consignment of goods by a bill of lading is to vest the goods in the consignee; if however the bill be special, to deliver the goods to *A.* for the use of *B.*, the property is vested in *B.*, and he has the right of bringing an action against the master of the ship if the goods are lost; but if the bill of lading be general to *A.*, and the invoice alone shows that the goods are sent on account of *B.*, the property is in *A.*, and *B.* has only a trust. The consignee of a bill of lading may assign it to another (*i*). In the case of *Wright* v. *Campbell* (*k*), *Lord Mansfield* made the following observations on this subject: "If there is an authority never so general, by indorsement upon a bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor) retains a lien, till the delivery of the goods, and before they are actually sold and turned into money. If the factor

(*f*) *King* v. *Meredith*, 2 Campb. 639.

(*g*) *Brown* v. *Hodgson*, 2 Campb. 36. See 1 East, 525.

(*h*) For the form of a bill of lading see Abbott on Shipping, 217, 218.

(*i*) *Evans* v. *Marlett*, or *Martell*, 1 Ld. Raym. 271; 12 Mod. 156; & 3 Salk. 290.

(*k*) 4 Burr. 2050, and 1 W. Bla .628. See *Appleby* v. *Pollock*, Abbott on Shipping, 368.

plays it over, *with notice*, to a third person, then it may be followed in the hands of such third person: for in such case it remains in his hands just as it did in the hands of the factor himself. But if the goods are *bonâ fide* sold by the factor at sea (as they may be, where no other delivery can be given), it will be good, notwithstanding the statute of 21 Jac. 1, c, 19; the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's own authority." A blank indorsement of a bill of lading has the same effect as an indorsement to deliver to a particular person (*l*).

Where there are several bills of lading, the person who first gets one of them by a legal title from the owner or shipper has a right to the consignment (*m*).

A bill of lading given before the goods are put on board is fraudulent, and the indorsement of it will convey no property in the goods, even to a *bonâ fide* indorsee (*n*).

Where a bill of lading is taken by a creditor as a security for his debt, upon his own account, the whole property passes by the delivery, and it is to be considered as a satisfaction of the debt *pro tanto*. But the parties are always at liberty to vary from the general rule by particular stipulations. Thus, where the consignor of goods from the *West Indies* wrote to his correspondents in *England*, that he had been obliged to give a bill of lading to *D.*, a creditor of the

(*l*) 6 East, 21, 2.

(*m*) *Caldwell* v. *Ball*, 1 T. R. 205.

(*n*) *Osey* v. *Gardner*, Holt, N. P. R. 405.

consignor, for the net proceeds of the goods, it being proved that the consignor had no intention to pass the whole property by the indorsement of the bill of lading, but merely to bind the consignment of the goods, and the amount of the goods had actually been accounted for by the executors of the consignor to *D.*, after a loss of the goods at sea had happened, it was held that the consignor had an insurable interest in the goods after the indorsement of the bill of lading (*o*).

An assignment of goods at sea, as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who has committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading (*p*).

Goods were bought by *Browne* & Co. of *Rotterdam*, by order of *Oddy* & Co. of *London*, and shipped by *Browne* & Co. for *Oddy* & Co. *Browne* & Co. then sent a letter to *Oddy* & Co., inclosing a bill of lading to the order of *Browne* & Co., unindorsed, and an invoice. *Oddy* & Co. delivered the bill of lading, *without indorsement*, to the defendants, on account of a debt antecedently due to them from *Oddy* & Co. The captain of the ship delivered possession of the goods to the defendants, and signed three bills of lading, all to the order of *Browne* & Co., and the shippers transmitted one of the bills of lading, indorsed, to the plaintiffs. The Court decided that the property in the goods had vested in the defendant; *Lord Ellenborough*, in the course of his judgment, observing, "that an indorsement of a bill of lading,

(*o*) *Hibbert* v. *Carter*, 1 T. R. 745.

(*p*) *Lempriere* v. *Pasley*, 2 T. R. 485.

for a valuable consideration and without notice, by the indorsee of a better title, passes the property. But supposing the plaintiffs to stand in the situation of *Browne* & Co., they would still not be entitled to recover. The goods were originally purchased for *Oddy* & Co., by their orders, and shipped for their use, and at their risk; they were therefore entitled to the possession of them as soon as they arrived, the shippers not having stopped them *in transitu*; and the only thing which stood between *Oddy* & Co. and such possession was the circumstance of the captain having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed, for the captain has actually delivered the goods to their assigns (*q*)."

Goods had been sent by *Thompson* from *Ireland*, to *Eustace* and *Holland*, their agents in *London*, for the purpose of being sold; a bill of lading was afterwards sent, not regularly indorsed, and *Eustace* and *Holland* sold the goods to *Boehm* and *Taylor*. *Thompson* having drawn bills on *Eustace* and *Holland*, which they were not able to pay, the plaintiff paid them for the honour of *Thompson* & Co.; and *having knowledge of the above-mentioned transactions*, he wrote to *Thompson* & Co. for an indorsement of the bill of lading, which they sent him. He then demanded the goods of the captain, and his demand not being complied with, brought an action of trover against the captain. *Lord Kenyon* held the circumstances stated a sufficient transfer of the

(*q*) *Coxe* v. *Harden*, 4 East, 211.

property to *Boehm* and *Taylor*, as the factor had transferred the property, having a competent authority so to do; and it was not necessary that he should have the possession of the goods, or an indorsement of the bill of lading (*r*).

The *bonâ fide* indorsee of a bill of lading, which has been indorsed to him as a security for debts due to him from the consignee, has a right to the possession of the goods against the consignor; though he knew at the time of the indorsement that the goods were not paid for by the consignee (*s*).

No property passes by the indorsement of a bill of lading without consideration (*t*).

Merchants in *London* receive from a stranger abroad a bill of lading of certain goods, in a letter requesting them to insure the goods. They declining to do business for the consignor, but acting *bonâ fide* for his interest, indorse the bill of lading to a friend of the consignor, who receives the goods, and afterwards fails with the proceeds in his hands. *Lord Ellenborough* ruled that the merchants by indorsing the bill of lading had made themselves liable to the consignor for the price of the goods (*u*).

The property in goods, for which the master of a ship has given bills of lading, may be transferred by delivery, without indorsing the bill of lading, and such transfer will be good against all the world, ex-

(*r*) *Dick* v. *Lumsden*, Peake, 189.

(*s*) *Cuming* v. *Browne*, 9 East, 506, & 1 Campb. 104.

(*t*) *Waring* v. *Cox*, 1 Campb. 369.

(*u*) *Corlett* v. *Gordon*, 3 Campb. 472.

cept an indorsee of the bill of lading for a valuable consideration (*x*).

Where an agent had purchased goods at *Riga* for the plaintiff, and *put them on board the plaintiff's vessel, which had been sent for them, as the plaintiff's goods*, the property was held to pass to the plaintiff, though the agent sent bills of lading, indorsed in blank, to his agent in *England*, with instructions, that if the plaintiff did not accept his bills of exchange the bills of lading should be indorsed over to the payees of the bills of exchange, which was accordingly done; and it was held that these proceedings of the agent did not change the property in the goods (*y*).

A. of *Liverpool*, wishing to draw upon the banking-house of *B.* & Co. in *London*, to a large amount, agreed (among other securities given) to consign goods to a mercantile house in *London*, consisting of the same partners as the banking-house, but under the firm of *B.* & *C.* He accordingly remitted the invoice of the cargo, and the bill of lading indorsed in blank, to *B.* & *C.*; but the cargo was prevented leaving *Liverpool* by an embargo. *A.* then became bankrupt, being considerably indebted to *B.* & Co., and the cargo was delivered to *A.*'s assignees by the captain. The Court held that *B.* & *C.* might maintain trover for the cargo against the captain (*z*).

Where the consignor of goods advised the consignee, by letter, that he had chartered a certain ship

(*x*) *Nathan* v. *Giles*, 5 Taunt. 558.

(*y*) *Ogle* v. *Atkinson*, 5 Taunt. 759.

(*z*) *Haille* v. *Smith*, 1 Bos. & Pul. 563.

on his account, and inclosed him an invoice of the goods laden on board, which were then expressed to be for account and risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order or assigns, he or they paying freight for the said goods according to charty-party; and the letter of advice also informed the consignee, that the consignor had drawn bills on him at three months for the value of the cargo; it was held by the Court of *King's Bench* that the invoice and the bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the goods in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu*, in case of the insolvency of the consignee. *Lord Ellenborough*, in giving judgment, laid great stress on the language of the invoice, that the goods were shipped *for the account* and at the risk of the consignee (*a*).

In general, it is the duty of a shipper of goods to send a letter of advice of the shipping to the consignee, but this is controlled by the course of dealing between the parties (*b*).

The insolvency of the plaintiff is a defence to an action for non-delivery of goods pursuant to contract (*c*).

(*a*) *Walley* v. *Montgomery*, 3 East, 585.

(*b*) *Goom* v. *Jackson*, 5 Esp. 112.

(*c*) *Reader* v. *Knatchbull*, 5 T. R. 218. n.

CHAP. VIII

Of stopping in Transitu.

IN endeavouring to show, in the last chapter, what circumstances amount to such a delivery of goods to the vendee as will vest the property in him, it was impossible not to refer occasionally to the right of the vendor to resume the possession of the goods during the course of their conveyance to the vendee, in the event of the insolvency of the latter. This is called stopping *in transitu.* It is a right, founded on equitable principles, and has been adopted by the Courts of Law for the purpose of preventing the vendor from being injured by the insolvency of the vendee.

Stopping *in transitu* is a practice of no great antiquity, having been unknown to the law as lately as the year 1690. The general principle of the law upon this subject is stated as follows by the present *Lord Chief Justice of the King's Bench,* in his highly valuable Treatise on the Law of Shipping (*a*): "When goods have been shipped upon credit, and the consignee has become a bankrupt, or failed, the law, in order to prevent the loss that would happen to the consignor by the delivery of them, allows him, in many cases, to countermand the delivery, and before or at their arrival at the place of destination to cause them to be delivered to himself, or to some other person for his use."

(*a*) Chap. 9, p. 351.

We will now examine the authorities which are to be met with in our law-books, in order to discover under what circumstancees the right of stopping goods *in transitu* may be exercised.

The case of *Snee* and *Baxter*, assignees of *John Tollett* v. *Prescott* and others (*b*), which came on before *Lord Hardwicke*, in the Court of *Chancery*, gave rise to much discussion on the doctrine of stopping *in transitu*, and has often been referred to, in subsequent cases, as a leading decision on that subject. It is not, however, thought necessary to state the facts of that case here, or the discussions to which it gave rise, because the decision appears to have ultimately turned upon equitable grounds, and the particular circumstances of the case; and the subject has since been frequently discussed in the Courts of Law, and may now be regarded as settled by a series of adjudications in those Courts. Mr. *Justice Buller*, in observing upon this case, in the case of *Lickbarrow* v. *Mason* (which will be immediately cited) says, "It seems to me that, on taking the whole of the case together, it is apparent that whatever might have been said on the law of the case in a most elaborate opinion, *Lord Hardwicke* decided on the equity alone arising out of all the particular circumstances of it, without meaning to settle the principles of law (*c*)." In *Lickbarrow* v. *Mason*, which first came on upon a demurrer to evidence in the *King's Bench*, that Court decided, that though the consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the

(*b*) 1 Atk. 245; 6 East, 28, note.
(*c*) 6 East, 30, note.

insolvency of the latter; yet, that if the consignee assign a bill of lading to a third person for a valuable consideration, and without notice to the assignee that the goods are not paid for, the consignor has no right, against such assignee, to stop the goods *in transitu.* This judgment was over-ruled in the *Exchequer Chamber*; and the case being afterwards brought before the *House of Lords* by a writ of error, the judgment of the *Exchequer Chamber* was there reversed, on the ground that the demurrer to evidence appeared to be informal upon the record, and the Court of *King's Bench* was directed to award a *venire de novo.* After a second trial, the Judges of the *King's Bench* declared themselves of the same opinion as before; but, as it was understood to be intended to take the case again to the *House of Lords,* they gave judgment without argument. It does not appear that any thing further was done in the case; and the judgment of the Court of *King's Bench* seems to have been considered as law from that time, and has been recognized in subsequent cases (*c*).

If the consignee of goods, to whom a bill of lading is indorsed in blank, assign it as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards, by an agreement between them, they become partners in the goods, by which agreement it appears that the consignor has not been paid for the goods, the assignee

(*c*) See the case reported in its several stages in 2 T. R. 63; 1 H. Bla. 357; 2 H. Bla. 211; 5 T. R. 367. 683, and the argument of Mr. Justice *Buller,* in the House of Lords, in 6 East, 20, note, which contains an elaborate investigation of the law upon the subject of stopping goods *in transitu.*

of the bill of lading thus having knowledge of the fact, that the goods are not paid for, and becoming, by the circumstances stated, a partner with the consignee, the consignor is not deprived of his right to stop the goods *in transitu* (*d*). But the *bonâ fide* indorsee of a bill of lading, which is indorsed to him as a security for debts due to him from the consignee, has a right to the possession of the goods against the consignor, though he knew, at the time of the indorsement, that the goods were not paid for by the consignee in money, but only by the consignee's acceptances, payable at a day not then arrived; though if he had known that the consignee was in insolvent circumstances at the time, and not likely to pay his acceptances, he would have stood in the same situation as the consignee (*e*). The rule of law on this subject, as settled by these cases, is, that in order to defeat the consignor's right to stop the goods *in transitu*, it is not necessary that the assignee of the bill of lading should have taken the assignment "without notice that the goods had not been paid for," but that it is sufficient if he have taken it "without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable" (*f*). The fairness and honesty of the transaction afford the sole criterion of the validity and effect of the assignment of bills of lading in each particular case.

The vendee may under certain circumstances assign his title to another without an indorsement of the bill of

(*d*) *Salomons* v. *Nissen*, 2 T. Rep. 674.

(*e*) *Cuming* v. *Brown*, 9 East, 506; and 1 Campb. 104.

(*f*) 9 East, 526.

lading. Thus, where the purchaser of goods, to be paid for by a bill of exchange, after giving his acceptance, and before the time when the bill became due, and while the goods were *in transitu*, sold them for a valuable consideration, but without indorsing the bill of lading to the purchaser, *Lord Ellenborough* ruled that the purchaser had completed his title to the goods by accepting the bill of exchange, and that the sale by him defeated the seller's right to stop the goods *in transitu* (*g*).

Goods were consigned by the seller to *A.* the purchaser, in *London*, and sent to him by a carrier's waggon, and on their arrival at an inn in *London* they were attached by a creditor of *A.*, after which *A.* became a bankrupt, and his provisional assignee *marked the goods* at the inn. The Court held, that there was in this case an actual delivery of the goods to the assignee, to whom the rights of *A.* were transferred by the bankruptcy, and who had in consequence a right to receive the goods; and that the vendor could not stop them *in transitu* (*h*).

If in the course of the conveyance of goods from the vendor to the vendee the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them (*i*). And though the right of stoppage in general continues till the goods arrive at their journey's end, yet, if the vendee meet them on the road, and take them into

(*g*) *Davis* v. *Reynolds*, 4 Campb. 267.

(*h*) *Ellis* v. *Hunt*, 3 T. Rep. 464.

(*i*) *Wright* v. *Lawes*, 4 Esp. 82; *Mills* v. *Ball*, 2 Bos. & Pul, 457.

his own possession, the goods will then have arrived at their journey's end, with reference to the right of stoppage (*k*). Thus, the *transitus* may be put an end to either by the goods arriving at the shop or warehouse of the vendee, or by being taken into his immediate personal possession, and in either case the right of the vendor to stop the goods *in transitu* will be at an end.

It must, however, be owned that there appears at first sight some difficulty in reconciling a *Nisi Prius* case tried before *Lord Kenyon* with the principles just laid down. In that case a cargo consigned to a person at *Liverpool* was, on the arrival of the vessel there, taken possession of by the assignee of the consignee, who had become a bankrupt, and the ship was afterwards obliged to perform quarantine, and during the quarantine the goods were claimed by the consignor. *Lord Kenyon* ruled, that the consignor had a right to the goods, and said, "that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignee on the completion of the voyage; that a case put by the defendant's counsel, that the consignee had a right to go out to sea to meet the ship could not be supported, as it might go the length of saying that the consignee might meet the vessel coming out of the port from whence she had been consigned, and that that should divest the property out of the consignor, and vest it in himself, which was a position not to be supported, as there would then be no pos-

(*k*) 2 Bos. & Pul. 461.

sibility of any stoppage *in transitu* at all (*l*). This opinion of *Lord Kenyon* is also stated by the reporter to have been confirmed by the Court of *King's Bench*, on a motion for a new trial. The learned authors of a valuable book of reports, in order to reconcile this decision with other authorities, advert to a distinction between carriage by sea and carriage by land upon this point; observing, that in the former case the master, by signing the bill of lading, agrees with the consignor to deliver the goods at the destined port; whereas in the latter no such express agreement is entered into between the vendor and the carrier (*m*). And in a treatise which has been already referred to (*n*), this decision is said to be in exact conformity to the tenor of a bill of lading, by which the master always engages to deliver the goods *at* the place of destination, and which, therefore, gives no authority to the consignee to demand them before their arrival at that place. Nothing of this sort takes place between a consignor of goods sent by land, and the carrier; and we have already seen, that if any injury be done to the goods while in the hands of a carrier, the purchaser alone can bring an action against the carrier to recover damages for the injury (*o*). This distinction then between land and water carriage seems sufficient to reconcile the case last cited with the general principle laid down above.

Goods sent from *London* by *A.* to *B.* were lodged at the wharf of *C.* at *Exeter*, to be forwarded from

(*l*) *Holst* v. *Pownal*, 1 Esp. 240.

(*m*) 2 Bos. & Pul. 461, note.

(*n*) *Abbott* on Shipping, 362.

(*o*) 3 Bos. & Pul. 584, ante.

thence to *B.* at *North Tawton.* *B.* had ordered the goods to be sent to him in this way, but finding himself in insolvent circumstances, after the arrival of the goods at the wharf, he wrote to *A.* informing him that he could not take the goods. A question arose whether the transit of the goods was at an end by their arrival at *Exeter*; and the Court were of opinion that the wharfinger, not having been particularly employed by the vendee, (though it appeared that he would look to him as his paymaster,) was to be considered as a middle-man; and that the delivery of the goods to him did not take away the right of the vendor to stop them *in transitu* (*p*). And it makes no difference in such a case that the buyer names a particular wharfinger (*q*). So goods sent to a packer appointed by the buyer, may be stopped in the hands of the packer (*r*); but if the buyer have no warehouse, and use the warehouse of the packer as his own, the *transitus* will be ended by the arrival of the goods at the warehouse of the packer (*s*). Where goods were ordered by traders living in *London*, to be sent to their agent at *Hull*, for the purpose of being shipped for *Hamburgh*, the *transit* was at an end by the goods arriving at *Hull* (*t*). And though in a case where goods having been sent to an inn for the vendee, who intended immediately to ship them, and took them away for that purpose, but

(*p*) *Mills* v. *Ball*, 2 Bos. & Pul. 457. See *Stokes* v. *La Riviere*, 3 T. R. 466; and 3 East, 397.

(*q*) *Smith* v. *Goss*, 1 Campb. 282.

(*r*) *Hunt* v. *Ward*, cited 3 T. R. 467.

(*s*) *Scott* v. *Pettit*, 3 Bos. & Pul. 469.

(*t*) *Dixon* v. *Baldwen*, 5 East, 175.

being too late for the ship, returned them to the inn-keeper, and gave orders that they should remain there for a few days, till another ship should sail; it was held that the goods might be stopped *in transitu* (*u*): yet that decision has been since overruled; and in a late case, where the vendee had no warehouse, and had been in the habit of suffering goods to remain at the waggon-office of the carrier till they could be shipped, the *transitus* was held, by the Court of *Common Pleas*, to be at an end on the goods arriving at the waggon-office (*x*).

A usage for carriers to retain goods as a lien for a general balance due to them from the consignees, will not defeat the right of the consignor to stop the goods *in transitu*, on paying the price of the carriage of the particular goods only (*y*); and a carrier, who by the usage of a particular trade is to be paid for the carriage of goods by the consignor, has no right to retain the goods against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor (*z*).

In an action of *assumpsit* brought by the assignees of *Leyland* and *Cragg*, to recover the value of a quantity of wine, the following facts appeared in evidence: The wine in question had been ordered in the beginning of the year 1796, by *Leyland* and *Cragg*, who then carried on business as wine-merchants, and had been consigned to them, and a bill for

(*u*) *Hunter* v. *Beal*, 3 T. R. 466.

(*x*) *Rowe* v. *Pickford*, 1 B. Moore, 526.

(*y*) *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42.

(*z*) *Butler* v. *Woolcott*, 2 New Rep. 64.

120*l.* drawn on *Leyland* and *Cragg*, and accepted by them. By the excise-laws twenty days are allowed after the ship arrives to pay the duty, during which time the wine remains on board; if not paid within that time it is removed to the king's cellars, and during the time of the wine remaining there, the owner may have it on paying the duty, warehouse-room, &c.; but if the duty, &c. is not paid within three months, it is sold, and the overplus, after deducting the duty, is paid to the owner. *Leyland* and *Cragg* became bankrupts after the ship's arrival, but before the twenty days expired, and the duties not being paid, the wines were removed into the king's cellars. The plaintiffs contended that the goods had come into the bankrupts actual possession, and that the consignors could not stop them *in transitu*. *Lord Kenyon* said, "he was of opinion that the plaintiffs were not entitled to recover; the Courts had of late years leaned much in favour of the power of the consignor to stop his goods *in transitu*; it was a leaning to the furtherance of justice. *Lord Hardwicke* had been of opinion, that in order to stop the goods *in transitu* there must be an actual possession of them obtained by the consignor, before they come to the hands of the consignee; but that rule had since been relaxed; and it was now held that an actual possession was not necessary; that a claim was sufficient; and to that rule he subscribed. In the present case the bankrupt had no title to the actual possession till the duties were paid; until then they were *quasi in custodia legis*; before the sale, the agent for the consignors claimed, and endeavoured to get possession; that was a sufficient stopping *in*

transitu, in his opinion, to secure the rights of the consignor (*a*)."

A payment of part of the price of goods by the consignee does not take away the consignor's right to stop them *in transitu* (*b*); and if the vendee accept bills of exchange for the price of the goods, and become bankrupt before the bills of exchange are paid, the consignor may stop them; for, though the bills may be proved under the commission, that would only amount to a part-payment; and it makes no difference that the vendor has indorsed the bills to a third person (*c*).

Goods were purchased of the plaintiffs at *Manchester* by *Moisseron*, who was the general agent in *London* of the house of *Le Grand* & Co. of *Paris*, in the name of that house; by *Moisseron*'s directions the goods were sent for him to the house of the defendant, who was a packer; on their arrival there, *Moisseron* had some of the goods unpacked and sent away, and the rest re-packed. *Le Grand* & Co. failing while the goods so re-packed remained at the house of the defendant, the plaintiffs claimed a right to stop them *in transitu*. The Court of *Common Pleas* decided that the *transitus* was at an end; and *Lord Alvanley* said, "these goods were not sent to the defendant to be delivered by him to the house of *Le Grand* & Co. at *Paris*, but they were sent to *Moisseron*, the agent of that house in *London*, and were there to wait his disposal, he being invested with authority to send them to such market as he should

(*a*) *Northey* v. *Field*, 2 Esp. 613; *Nix* v. *Olive*, Abbott on Shipping, 364, 377, accord.

(*b*) *Hodgson* v. *Loy*, 7 T. R. 440.

(*c*) *Feise* v. *Wray*, 3 East, 93.

think most adviseable. The goods, therefore, were received by the defendant, not on the account of *Le Grand* & Co. but on that of *Moisseron*. The delivery to the defendant was clearly a delivery to *Moisseron*, although the goods were intended for exportation; and indeed his conduct shows that they were so considered, since, after their arrival at the defendant's house, he ordered some to be unpacked and sent away, and the remainder to be re-packed. Indeed *Moisseron* might, if he had so pleased, have made *London* the place of their ultimate destination, and disposed of the goods there" (*d*).

In an action brought by the assignees of a bankrupt, who was the vendee of goods, but had not paid for them, against the agent of *Fritzing*, who had stopped them *in transitu*, it appeared that an order had been given by the bankrupt to *Fritzing*, who was his correspondent abroad, to purchase the goods for him. *Fritzing* bought them accordingly of another merchant, who was a stranger to the bankrupt, and had no account or correspondence with him. The goods were shipped, and a bill of lading and invoice received by the bankrupt (before his bankruptcy,) and bills of exchange drawn on him for the price. After the vendee's bankruptcy, the defendant, on behalf of *Fritzing*, obtained from the bankrupt's brother the bill of lading and invoice, the bankrupt's acceptances not having been paid. The Court of *King's Bench* considered that the name of the original owner of the goods not having been made known to

(*d*) *Leeds* v. *Wright*, 3 Bos. & Pul. 320.

the bankrupt, and there being no privity between them, but the goods having been purchased, and the bills drawn in *Fritzing*'s own name, he stood in the relation of vendor to the bankrupt, at least so far as to authorize him to stop the goods *in transitu* (*e*).

If the consignor consign goods to be sold on the joint account of himself and the consignee, he may stop the goods *in transitu* on the insolvency of the consignee (*f*).

Stopping *in transitu* is in its nature essentially a proceeding *adverse to the vendee*; therefore a person to whom a consignee of goods, after an act of bankruptcy, has delivered up bills of lading upon his undertaking to apply the proceeds of the goods in discharge of bills of exchange drawn for the price, cannot retain them against the assignees of the bankrupt, though the consignor afterwards approve of the arrangement, for this was not an adverse proceeding; and it seems, that supposing the person to whom the bills of lading were given up had been an agent of the consignor at the time when the agreement was entered into, the law would have been the same (*g*).

The reader will have observed, that the delivery which the law requires to defeat the right of the vendor to stop the goods *in transitu*, is an actual delivery, either to the vendee himself, or at that place where the transit or journey of the goods is to end; as at the warehouse of the vendee, or at a packer's, &c. where the vendee has no warehouse of his own. The

(*e*) *Feise* v. *Wray*, 3 East, 93.
(*f*) *Newsom* v. *Thornton*, 6 East, 17.
(*g*) *Siffken* v. *Wray*, 6 East, 371.

question in all these cases is, whether the *transitus* is at an end? Whether the goods have reached their ultimate destination (*h*)?

We have seen that a delivery to a carrier does not take away the seller's right to stop the goods *in transitu*; our attention will next be directed to the effect of a delivery of goods on board a ship, as well in cases where they are sold in this country to be carried abroad, as where they are purchased abroad for the purpose of being brought into this country. An action of trover was brought by the assignees of bankrupts, to recover the value of a certain quantity of tobacco shipped by the defendants, by order of the bankrupts, on board the *Minerva*, bound from *London* for *Naples* and *Alexandria*, which ship was chartered to the bankrupts for three years from *July* 1792, and the tobacco was to be paid for by a bill at three months, drawn by the defendants on the bankrupts, and accepted by them. The goods were shipped on the 4th of *February* 1793, for which the mate's receipt was given, and an invoice of the goods was made out by the defendants in the names of the bankrupts. The vessel was detained by contrary winds at *Portsmouth*, during which time the bankrupts stopped payment; the defendants procured bills of lading to be signed by the captain to them, and, obtaining possession of the tobacco, procured it to be re-landed, and afterwards disposed of for their benefit. Mr. *Justice Grose*, before whom the cause was tried, held that, under these circumstances, the delivery of the goods on board the ship defeated the

(*h*) See *Stokes* v. *La Riviere*, 3 T. R. 466, and 3 East, 397.

vendor's right to stop them *in transitu* (*i*). Where *Crane*, a merchant in *London*, ordered tallow from the plaintiff, who resided in *Russia*, and the tallow was shipped at *Cronstadt* for *Crane*, on board a ship which was chartered by him; after which, and before the arrival of the ship in *London*, he committed an act of bankruptcy, and the plaintiff claimed a right to stop the goods *in transitu*, the plaintiff's counsel gave in evidence a letter from the plaintiff, requiring *Crane* to give security to their correspondent in *London* before the goods were delivered. *Lord Kenyon* said, "The whole question is, whether there was a delivery to *Crane* of the goods before this letter was written, or not? Before the delivery, the party may annex any condition to it, but not after. If the ship was then chartered by *Crane*, it is a complete delivery of the goods to him; and there can be no stopping *in transitu*" (*k*). But the Courts in this country will recognize the municipal law of a foreign state, which authorizes the consignor to detain the goods in case of the insolvency of the consignee, though they have been delivered on board a ship chartered by the consignee (*l*). And indeed the law, as laid down above by *Lord Kenyon*, has been since over-ruled by the *King's Bench* in the case of *Boehtlinck* v. *Inglis*, in which case it was decided, that a delivery of goods abroad on board a ship chartered by the purchaser will not prevent the consignor's stopping them *in transitu* on the insol-

(*i*) *Fowler* v. *Kymer*, or *M'Taggart*, 1 East, 522, and 3 East, 396.

(*k*) *Boehtlinck* v. *Schneider*, 3 Esp. 58.

(*l*) *Inglis* v. *Usherwood*, 1 East, 515.

vency of the consignee (*m*); and the case was distinguished from the above-cited case of *Fowler* v. *Kymer*, for there the bankrupts were in possession of the ship for three years, and had the complete control over her.

The right of a consignor to stop goods *in transitu* is not defeated by the goods being attached, while in their *transit*, by process out of the *Lord Mayor's Court*, at the suit of a creditor of the consignee (*n*).

If goods, after they are sold, remain in the warehouse of the vendor, and he receive warehouse-rent for them from the vendee, this amounts to a complete delivery of the goods to the vendee, and puts an end to the right of the vendor to stop them *in transitu* (*o*).

The indorsement of a bill of lading without consideration will not entitle the indorsee to stop the goods *in transitu* (*p*).

A. being indebted to *B.* on a balance of accounts, including bills of exchange accepted by *B.* for *A.*, and still running, consigns goods to *B.* on account of his balance; *A.* has no right to stop the goods *in transitu* on *B.* becoming insolvent before the bills are paid, the circumstance of *A.* being indebted to *B.* on the balance of accounts divesting him of all control over the goods from the time of the shipment; for the rights of the parties must depend upon the state

(*m*) *Bohtlingk* v. *Inglis*, 3 East, 381.

(*n*) *Smith* v. *Goss*, 1 Campb. 282.

(*o*) *Hurry* v. *Mangles*, 1 Campb. 452; *Harman* v. *Anderson*, 2 Campb. 243, accord.

(*p*) *Waring* v. *Cox*, 1 Campb. 369.

of things when the bill of lading was signed and indorsed (*q*).

Although goods are delivered to the packer of the purchaser, he having no warehouse of his own, if it be stated to the packer, at the time of the delivery, that they are to be paid for in ready money, they may be stopped *in transitu* (*r*).

Goods were sold by *A.* to *B.*, and delivered by a lighterman on board a ship, of which *D.* was the master, he giving an acknowledgment in the following terms: "Received on board the *George*, for *Hamburgh*, for and on account of *A.*" *B.* afterwards sold the goods to *E.* who paid him for them, and *D.* the captain, without *A.*'s privity, signed and delivered a bill of lading of the goods to *E.* The Court held, that *A.* did not thereby lose his right of stopping the goods *in transitu*; and *Lord Chief Justice Gibbs* said, "Exclusively of the particular form of the receipt for the goods, I take it, the practice is, that the person who is in possession of the lighterman's receipt is the person entitled to the bill of lading, which ought to be given only to the holder of that receipt; consequently the holder of that receipt retains a control over the goods, at least until he has exchanged the receipt for the bill of lading (*s*).

Notice by the seller to the carrier to stop the goods *in transitu* revests them in him; and a subsequent delivery by the carrier to the buyer will not divest them (*t*).

(*q*) *Vertue* v. *Jewell*, 4 Campb. 31.

(*r*) *Loeschman* v. *Williams*, 4 Campb. 181.

(*s*) *Craven* v. *Ryder*, 6 Taunt. 433.

(*t*) *Litt* v. *Cowley*, 7 Taunt. 169.

As a factor, who is employed to *sell* goods for his principal, cannot by law *pledge* them, so he cannot, by *pledging* a bill of lading, deprive the principal of his right to stop the goods *in transitu* (*u*).

When the consignor of goods intends to stop them *in transitu*, and for that purpose directs the captain of a ship on board of which the goods are sent not to deliver them to the consignee, the captain is bound to comply with the order of the consignor, and to detain the goods for him; and an action cannot be supported by the consignee against the captain for not delivering the goods to him (*x*).

If the master of a ship has delivered part of a cargo to the consignee, the *transitus* is thereby ended as to the whole, and the consignor cannot stop the remainder (*y*).

Fox, a wine-merchant in *London*, having ordered five pipes of wine from Messrs. *Abbott* & Co. of *Oporto*, they loaded them on board a vessel bound for *London*, and took from the master bills of lading for delivery to order or assigns. One of these bills they transmitted to *Fox*, in a letter, wherein they said that they had shipped the wine on his account, had sent him a bill of lading, and drawn upon him for the price. *Fox* accepted the bill of exchange thus drawn upon him, which was payable nine months after date. Before the bill of exchange became due the wine arrived, and *Fox* not being able to pay the

(*u*) *Newsom* v. *Thornton*, 6 East, 17.

(*x*) Assignees of *Burghall* v. *Howard*, 1 H. Bla. 365, note.

(*y*) *Slubey* v. *Heyward*, 2 H. Bla. 504. See *Hammond* v. *Anderson*, 1 New. Rep. 69, ante.

duties, it was sent to the king's warehouse under the statute 26 G. 3, c. 59; while it remained there, *Fox* being indebted to *Mary Nix*, and called upon for payment, and unable to pay, sold the wine to her for 40*l.* then paid to him, and the amount of his debt. He became a bankrupt soon afterwards; and the agents of the consignors having paid the duties and obtained the goods, Mrs. *Nix* brought an action against them for the value. It was contended at the trial, that there was no difference between the indorsement of a bill of lading by the consignor, and sending it in a letter of this import; but *Lord Ellenborough*, who tried the cause, held that the above circumstances had not divested the consignor of his right to stop the goods *in transitu* (*z*).

A person having a lien on goods, but having parted with the possession of them, cannot afterwards stop them *in transitu* (*a*).

Turner, residing in *Cornwall*, being indebted to *Staples* & Co. in *London*, sent up 3,000 dollars to them in part-payment of his debt. Before the dollars reached *Staples* & Co. they had become bankrupts, and had left their house. *Bowles* & Co., who were also creditors of *Turner*, by his permission gained possession of the goods while they were in the hands of the carrier. The assignees of *Staples* & Co. thereupon brought an action of trover against *Bowles* & Co. for the value of the dollars. The cause was tried before *Lord Kenyon*, who said that he thought

(*z*) *Nix* v. *Olive*, Abbott on Shipping, 377.

(*a*) *Sweet* v. *Pym*, 1 East, 4.

the dollars were not countermandable; that if they had been sent on any particular account, and described as such, and *Turner* apprehended the bankruptcy of *Staples* & Co., he might have stopped them; but here was a remittance of money not made on a particular account, or for a particular purpose, but a general remittance from a debtor to his creditor. There was an appropriation in favour of persons who were *bonâ fide* creditors; and he was therefore of opinion, that the defendants had no right to the possession of the property against the assignees of *Staples* & Co. The plaintiffs had a verdict (*b*).

If the seller stop goods *in transitu*, to prevent their getting into the hands of an insolvent broker, he does not thereby rescind the contract of sale; and if he afterwards offer to deliver the goods to the buyer, he may maintain an action against the buyer for the price (*c*).

(*b*) *Smith* v. *Bowles*, 2 Esp. 578. See 1 Gow. 58.

(*c*) *Kymer* v. *Suwercropp*, 1 Camp. 109.

CHAP. IX.

Of Bankruptcy, as affecting the Sale of Personal Property.

THE transfer of personal property by sale is affected by the bankrupt-laws in two ways: First, by the operation of stat. 21 Jac. 1, c. 19, by which property, which does not belong to a trader, but is allowed by the real owner to remain in his possession, and under his control, vests, in the event of his becoming a bankrupt, in the commissioners; and, secondly, by the general policy of those laws which invalidate sales made by traders, in contemplation of bankruptcy, with an intention of favouring particular creditors.

We will begin with the statute of *James*, which (s. 10, 11), after reciting "that it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own," enacts, that "if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition, as owners, that in every

such case the commissioners, or the greater part of them, shall have power to sell and dispose the same to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt." A doubt was formerly entertained whether the enactment was not so far restrained by the recital as to be limited to the bankrupt's own property (*a*); but as on further consideration it was remembered that if a man had, before the statute, conveyed his own goods to a third person and remained in possession, the sale would have been void under stat. 13 *Eliz.* c. 5, it was at length settled that the statute of *James* has a wider operation, and applies to cases in which the bankrupt is in possession of the property of a third person, and is allowed to treat it *as his own*; but does not extend to cases where a man has possession of the goods of another as a trustee, or a factor, or as having a bare authority to sell them for the principal (*b*).

Mortgages and conditional conveyances of goods and chattels are within the statute, as well as absolute conveyances; therefore mortgagees of stock in trade are not to be considered to have specific liens upon the bankrupt's estate, but can only come in under the commission as general creditors; and though a mortgage of a moiety of the partnership stock be made by one partner to the other, the stock will still be considered (as to the moiety) to be in the possession,

(*a*) See *Ryall* v. *Rolle*, 1 Atk. 165, and 1 Ves. 348. 375, and the cases there cited.

(*b*) *Mace* v. *Cadell*, Cowp. 232; *Bryson* v. *Wylie*, Cooke's Bkpt. Laws, 362, and 1 Bos. & Pul. 83, note.

order, and disposition of the mortgagor within the statute, unless the mortgagee take the stock into his exclusive possession (*c*).

An assignment of goods on board a ship at sea is not within the statute. Thus, *Roger Williams* and *Jeremiah Wilder*, his partner, gave a bond to *Heathcote* for 1,200*l.*, and on the same day executed a deed of assignment, by which it was agreed that if default should be made in the payment of the money advanced by *Heathcote*, *Williams* and *Wilder* should make over to him the goods in two ships, together with the bills of lading which might be the proceeds of the returns of the said goods and cargo for any port in *England*, and that should be consigned to *Williams* and *Wilder*, and that they would put *Heathcote* in possession thereof. *Williams* did accordingly assign over to *Heathcote* thirteen bills of lading, but did not indorse them to him. The ships were at sea at the time of these transactions. *Williams* having become a bankrupt, a bill was brought in *Chancery* by his assignees for the goods. It was contended by the counsel for the plaintiff, that as there was no indorsement of the bills of lading and invoices to *Heathcote*, the goods remained under the direction and disposition of the bankrupt, and were therefore within the statute of *James*. But *Lord Hardwicke* decreed in favour of the defendant, expressing his opinion, that though there were no proper words of assignment in the deed to amount to a legal sale, yet that *Heathcote* had an equitable lien on the goods against the assignees, who are subject to all the equities which exist

(*c*) *Ryall* v. *Rolle*, 1 Atk. 165; and 1 Ves. 348. 375.

against the bankrupt; with regard to the ship, there was no colour to say it was so left in *Williams*'s possession as that he could take upon him the order and disposition of it; and by the delivery of the bills of lading and invoice every thing which could show a right to the goods was delivered over to *Heathcote* (*d*). The distinction with respect to equitable liens is, that as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not over-reach the title of the vendee; but as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the thing without discharging the money due (*e*). Thus, where a trader, expecting goods to be shipped from his correspondent abroad, enters into an agreement to assign the goods as a security to a person advancing him money on them, and afterwards (having in the intermediate time committed an act of bankruptcy,) indorses a bill of lading of the goods to the same creditor, these facts will be a legal defence to an action of trover brought by the assignees of the bankrupt against the creditor (*f*).

The conveyance of a ship at sea, in which case the vendee cannot immediately take possession, may be made effectually, provided he take possession as soon as he has an opportunity; but a transfer of a ship and cargo at sea, made as a security for money bor-

(*d*) *Brown* v. *Heathcote*, 1 Atk. 160.

(*e*) Per *Ashhurst*, J. in *Lempriere* v. *Pasley*, 2 T. Rep. 490.

(*f*) *Lempriere* v. *Pasley*, 2 T. Rep. 485.

rowed, by executing and delivering to the creditor a bill of sale of the ship, a policy of insurance upon the ship and cargo, and indorsing the bill of lading, will not pass the property in the ship and cargo, if the creditor neglect, upon notice of the ship's return, to take possession, or to do any act to notify the transfer of the property to him; and under such circumstances, in case of the bankruptcy of the original owner of the ship, the ship and cargo pass to his assignees, as being in his possession, order, and disposition, at the time he became bankrupt (*g*). But where the owners of a ship executed an absolute bill of sale of the ship for a nominal consideration, and there was a parole agreement between the parties that the purchasers should accept bills for the accommodation of the sellers, and that the ship should be a security for such acceptances, and that until default should be made by the sellers in providing for the acceptances, the ship should remain in their possession and management, and the ship was registered in the names of the purchasers, but the sellers remained in the possession and management of her, and appeared to the world as owners of the ship; and before default was made by the sellers in providing for the acceptances the purchasers became bankrupts, and their assignees immediately seized the ship, and afterwards the sellers became bankrupts; it was held that an action of trover for the ship could not be maintained by the assignees of the sellers against the assignees of the purchasers, for the parole agreement could not be set up against the bill of sale, and the case did not

(*g*) *Mair* v. *Glennie*, 4 Ma. & Selw. 240.

come within the statute of *James*, the ship having been seized by the assignees of the purchasers before the bankruptcy of the sellers (*h*).

A woman before marriage, with consent of her intended husband, conveyed her estate, stock in trade as a milliner, and furniture, to trustees to enable her to carry on her business separately, and for some time after the marriage carried on her business in a house separate from her husband, but afterwards removed all her effects to his house, and carried on her trade in a separate apartment there; on these facts being submitted to a jury, they found that the trade was not carried on separately, and gave a verdict against the wife's trustee, as to the stock in trade, but in his favour for the furniture, the action being brought by the trustee against the assignees of the husband, who had become a bankrupt, both for the stock and furniture. A new trial was moved for, on the ground that the trust deed did not protect the furniture, but was refused by the Court; and it was held to be no objection to the settlement that there was no inventory of the goods intended to be settled (*i*). These cases seem to have settled the law; but it may perhaps be doubted whether some of them do not go rather further than is quite consistent with that reasonable security which persons dealing with traders have a right to expect. In the case of an executor or administrator indeed, it will be generally known that the goods had belonged to his testator or intestate; and there seems no reasonable

(*h*) *Robinson* v. *M'Donnell*, 2 Barn. & Ald. 134.

(*i*) *Jarman* v. *Woolloton*, 3 T. R. 618.

objection to protecting the right of personal representatives and legatees of the deceased, by allowing the executor to carry on the trade for a time without subjecting the property to his personal liabilities. But permitting one person to trade as the trustee of another, (except where he acts in the known character of a factor,) seems likely to lead to much secret fraud, and to subject those who have dealings with such traders to great hardship, by depriving them of the only fund to which they could look for security—the apparent property of the trader. "I lament," said *Lord Kenyon*, on one occasion (*l*); "that it ever was decided that the possession and apparent ownership of personal property may be in one person, and the title to it in another; for I think it would have been better for the public if the possession of such property (except in the case of factors) were to carry the title with it. The case of real property is in a different situation; no purchaser is satisfied with the mere possession of an estate; before he purchases he calls for the title-deeds, and examines whether or not the possessor be entitled to the estate. But the mere possession of personal property is generally the title on which the world relies."

The case of *Darby* v. *Smith* (*m*), which has been since adjudged in the *King's Bench*, seems hardly reconcileable with that of *Jarman* v. *Woolloton* above cited. In the first-mentioned case, certain goods, the property of a widow and her children, were, upon her second marriage, transferred to trustees, in trust to permit

(*l*) *Gordon* v. *East India Company*, 7 T. Rep. 234.

(*m*) 8 T. Rep. 82.

her husband to enjoy them, on condition that he should pay the trustees, for the use of the children, 800 *l.* by yearly instalments of 100 *l.*, beginning on the 11th of *July* 1789; he continued in possession of the goods till 1797, having paid only 250 *l.*; the trustees, on the 9th of *July* in that year, put a man into possession of the goods in the house of the husband, who on the next day committed an act of bankruptcy. The Court held that the assignees of the bankrupt were entitled to the goods under the statute of *James*. *Lord Kenyon* stating that the bankrupt by the part-payment had acquired some right in the goods, and that he knew not by what authority the trustees had re-possessed themselves of them. It is clear, therefore, (as has since been observed from the Bench) (*n*), that *Lord Kenyon* thought the bankrupt still in possession at the time of the bankruptcy. If, indeed the legal possession had been in the trustees at the time when the act of bankruptcy was committed, the case would not have come within the terms and meaning of the statute. This circumstance distinguishes it from a later case which has been determined in the *King's Bench*. A quantity of bacon lying at three wharfs had been sold in *December* 1809, and a bill of parcels, and an order to the wharfinger for the delivery of the bacon, at the same time handed over by the seller to the purchaser. The bacon continued at the wharfs in the name of the seller till the 13th of *June* following, during which time he disposed of some lots of it, which were delivered by the wharfinger according to his order. On that day the seller stopped

(*n*) 15 East, 28.

payment, of which circumstance the purchaser being apprized, in consequence thereof lodged the order of the vendor with the wharfinger, and the bacon was transferred by the wharfinger into the purchaser's name. On the 22d of *June*, the seller became a bankrupt. It was held by the Court, that the assignees of the seller were not entitled to these goods, as there had been a complete possession in the vendee before the bankruptcy, and the statute only applied to goods in the bankrupt's possession at the time of the bankruptcy (*o*).

If the transfer of the property of a trader be generally known, though he be allowed by a particular stipulation to continue in possession, he will not be considered the reputed owner within the statute. Thus, where by agreement between *Meek* and *Moss*, the former engaged to surrender to the latter a dwelling-house and land, being copyhold, and to convey to him, and deliver up, all the household furniture and stock enumerated in the said agreement, and to be comprised in an inventory to be made by *J. S.*, for *Moss*, for whom *J. S.* should take possession; and it was agreed that *Meek* should afterwards be allowed to remain in possession for three months, which agreement was notorious in the neighbourhood; possession was given to *J. S.* after which *Meek* was left in possession of the house, furniture, and stock, and became a bankrupt before the expiration of the three months, this was held not to be a possession within the statute (*p*).

(*o*) *Jones* v. *Dwyer*, 15 East, 21.

(*p*) *Muller* v. *Moss*, 1 Ma. & Selw. 335.

The first mate of an *East India* ship had, by the indulgence of the *East India* Company, the privilege of sending goods to *England* in the ship to a certain amount; and by the private regulations of the Company, these privileges were only for the proper use of the officers, and never to be disposed of unless the Company gave special leave for that purpose. The mate afterwards made an assignment of the goods to one *Taylor*, who shipped them in the name of the mate, and as his privilege; and they were entered in the Company's books as the mate's, and sold as his, after which he committed an act of bankruptcy; whereupon *Taylor* applied at the proper office at the *India House* for an account of the sale of the goods, and claimed to receive the same under the assignment, but they refused to account and pay for the goods to *Taylor*, who thereupon brought an action for money had and received against the *East India* Company. The Court held the case within the statute of *James*, and consequently that the plaintiff could not recover (*q*).

It seems that a usage of trade may, under certain circumstances, control the operation of the statute, and prevent goods which have been sold by a trader from passing to his assignees, though they have remained in his possession (*r*); but a usage to have that effect must be of such a nature that persons dealing with the trader may know that the property may possibly not be the property of the possessor. A custom that the purchaser of hops shall leave them in the seller's warehouse for re-sale (paying a rent for them,) but

(*q*) *Gordon* v. *East India Company*, 7 T. Rep. 228.

(*r*) See *Horn* v. *Baker*, 9 East, 215.

without affixing any mark to distinguish them from the bulk of the seller's stock, is not such a usage as will prevent the hops from becoming the property of the seller's assignees in case of his bankruptcy (*s*). And where standing timber is sold to a trader, with a proviso, that in case of his bankruptcy before payment the vendor may retake it, and the vendee having cut down the timber becomes a bankrupt, the vendor cannot re-take the timber of which the bankrupt has been thus allowed to appear to the world as the owner (*t*).

Goods in the hands of a retail dealer, upon *sale or return*, pass under a commission of bankrupt against him (*v*). But where goods, which had been sent to a trader on sale and return, had been taken in and paid for by his servant in his absence, but never opened before the trader's bankruptcy, which happened two days after the goods were taken in, the Court of *Common Pleas* held the case not within the statute of *James* (*u*).

Let us now consider the effect of a conveyance of personal property made by a trader to a particular creditor in contemplation of bankruptcy, with a view to satify his demand, and thereby to give him a preference over the general body of the trader's creditors. A conveyance of this sort is considered to be contrary to the spirit and object of the bankrupt-laws, which is the making of an equal division of the bankrupt's property among *all* his creditors, and on that account

(*s*) *Thackthwaite* v. *Cock*, 3 Taunt. 487.

(*t*) *Holroyd* v. *Gwynne*, 2 Taunt. 176.

(*v*) *Livesay* v. *Hood*, 2 Campb. 83. See *Neate* v. *Ball*, 2 East, 117. post.

(*u*) *Gibson* v. *Bray*, Holt N. P. R. 556.

the law holds it fraudulent and void. Thus where a trader, for the purpose of indemnifying a person who agreed to act as his banker, conveyed all his stock to him, subject to a defeazance on the trader paying all the money which the other should advance to him, and the trader continued in possession of the stock, it was held by the Court to be an illegal preference in fraud of the bankrupt-laws (*x*). And it makes no difference, in a case of this sort, that the trader is in full credit at the time the conveyance is executed (*y*).

A conveyance of all a man's property in trade to pay a *bonâ fide* debt of the most meritorious nature, though not amounting to one half of the debt, is fraudulent, because it is not an act in the ordinary course of business, and must necessarily produce an act of bankruptcy, and defeat the equality intended by the bankrupt-laws; and if the conveyance be not of *the whole*, but of a part only, and the excepted part be merely colourable, that is also void: if the conveyance be for the benefit of all the creditors except one, it is void; and even a conveyance to distribute the effects of the bankrupt in the same manner as the statutes relating to bankruptcy would direct, is fraudulent and void, for a man is not allowed to choose his own assignees. And where a trader on the 7th of *November* indorsed a promissory note, and sent it to a creditor, to whom he was indebted in a larger sum than the amount of the note,

(*x*) *Worseley* v. *De Mattos*, 1 Burr. 467.

(*y*) *Hassells* v. *Simpson*, Dougl. 89, note. See also *Wilson* v. *Day*, 2 Burr. 827; *Compton* v. *Bedford*, 1 W. Bla. 362; *Law* v. *Skinner*, 2 W. Bla. 996; *Butcher* v. *Easto*, Dougl. 295; *Berney* v. *Davison*, 1 Brod. & Bing. 408; *Berney* v. *Vyner*, 1 Brod. & Bing. 482.

and the note was received by the creditor on the 10th, the tradesman having previously (on the 8th) committed an act of bankruptcy, and it did not appear that there had been any course of dealing between the parties, by indorsing and sending bills or notes from one to the other, nor that the bill was sent in payment of any particular debt, it was held that the transaction was fraudulent, and void (*z*).

Where a trader, in contemplation of an act of bankruptcy, enclosed certain promissory notes in a letter to a particular creditor in discharge of his debt, stating in the letter that he had done so in order to show him that preference which he conceived was his due, but this was done without the knowledge of the creditor, and an act of bankruptcy was committed by the trader before the note reached the creditor, the Court held the assignees of the trader entitled to recover the notes from the creditor, the motive of the bankrupt being to give him a preference, and the act being incomplete, as the act of bankruptcy took place before the creditor agreed to receive the notes (*a*). Indeed, a case had been decided in the *Common Pleas* some years before, which went a step further than the last-mentioned case. There the plaintiff's brother carried on business in two shops, an upper and an under one; and being indebted to the plaintiff, assigned to him his goods in the upper shop, being one third part of his stock in trade, and this assignment was made for the purpose of giving him a preference, and in contemplation of an act of bank-

(*z*) *Alderson* v. *Temple*, 4 Burr. 2235; 1 W. Bla. 660, S. C.

(*a*) *Harman* v. *Fishar*, Cowp. 117.

ruptcy. The Court held this transaction a fraud upon the bankrupt-laws, and an act of bankruptcy, and consequently that the assignment was void (*b*). It makes no difference in a case of this sort that the goods are actually received by the creditor before any act of bankruptcy is committed by the bankrupt; for if the transaction be originally a pretended sale, not in the usual course of trade, and merely intended to give a preference to the particular creditor, and to defeat the equality among the whole body of creditors, which it is the object of the bankrupt-laws to give, the sale will be void; though it will not in itself be an act of bankruptcy unless it be by deed, for no fraudulent transaction, which is not a deed, is in itself an act of bankruptcy (*c*).

It is to be observed, that there is a great difference between insolvency and bankruptcy; a man may be insolvent without becoming a bankrupt, which can only be done by committing one of the acts of bankruptcy enumerated in the statutes concerning bankrupts; he may on the other hand become a bankrupt though he possess funds to pay more than the full amount of all his debts; transactions, therefore, of the kind which we have been of late considering, would not be vitiated by the trader being in insolvent circumstances, if they were not effected in contemplation of bankruptcy. An observation which is reported to have fallen from *Lord Chief Justice De Grey* (*d*), that "insolvency is an act of bankruptcy,"

(*b*) *Linton* v. *Bartlett*, Cowp. 120; 3 Wils. 47, S. C.

(*c*) *Rust* v. *Cooper*, Cowp. 629.

(*d*) In *Law* v. *Skinner*, 2 W. Bla. 997.

is not to be taken as law, and probably is merely a mistake of the reporter (*e*).

Where a trader, however, makes a sale of goods in contemplation of bankruptcy, though such sale is not binding on the assignees, they are nevertheless not absolutely bound to reject the contract, but have the right (at their election) to affirm it as a valid contract (*f*).

Bankers having fraudulently sold out stock belonging to a customer, which stood in their names, and appropriated the proceeds to their own use; while they remained solvent wrapped up certain bonds belonging to them in an envelope, inscribed with the customer's name, and enclosed a memorandum, stating that they had deposited the bonds with him as a collateral security for his stock, which they promised to re-place, this parcel they deposited among the securities belonging to other persons who dealt with them, but gave no information of these circumstances to the customer till the eve of their bankruptcy, when they sent him the parcel containing the bonds, saying they must stop payment next morning: it was held that the customer could not retain the bonds against the assignees of the bankrupt (*g*).

Where, by the course of dealing between *A.* and *B.*, the latter was allowed either to retain or return the goods sent by the former, and *A.* sent goods to *B.*, which arrived on the 19th of February, and *B.*, after keeping them in his possession till March the 4th, sent part of them back on that day, and the

(*e*) See Dougl. 91.

(*f*) *Nixon* v. *Jenkins*, 2 H. Bla. 135.

(*g*) *Wilson* v. *Balfour*, 2 Campb. 579.

remainder on the next day, *B.* being at that time in a state of insolvency, and committing an act of bankruptcy on the evening of the 5th of March, after the goods were returned, the Court held the transaction an illegal preference in contemplation of bankruptcy; and that the property in the goods remained in *B.* notwithstanding the return, and on his bankruptcy vested in his assignees (*h*).

The attentive reader will have observed, that in the cases already cited the preference given by the bankrupt has been strictly a voluntary act. It is that circumstance which invalidates such a preference, as militating against the bankrupt laws; but many cases, in which the preference given to a particular creditor was not merely voluntary on the part of the bankrupt, but was occasioned by peculiar circumstances, giving another character to the transaction, have been held valid in the courts of law and equity. Thus, where trust-money had been placed in the hands of a widow for her children, the widow carrying on an extensive trade, and she had, at a period short of two months before an act of bankruptcy committed by her, made a deed for securing these trust-monies to her children, and the children on their mother's bankruptcy filed a bill to have this deed established, and to have a preference to their mother's creditors, *Lord Parker*, then Lord High Chancellor, considered the mother as having acted honestly in pursuance of the trust reposed in her, and established the deed (*i*). It must how-

(*h*) *Neate* v. *Ball*, 2 East, 117.

(*i*) *Cock* v. *Goodfellow*, 10 Mod. 489. See *Jacob* v. *Shepperd*, 1 Burr. 478; *Unwin* v. *Oliver*, 1 Burr. 481.

ever be observed, that this case may be supported upon another principle, for the Chancellor thought that the transaction did not take place with a distinct contemplation of bankruptcy, though the situation of the mother at the time when the deed was executed was such as must have excited fears in her mind as to the event.

It seems impossible to reconcile two cases which will now be stated, with those which have already been referred to, or with others which will be the subject of our consideration in the remainder of the present chapter. In the first of these cases, a trader, being in insolvent circumstances, and in contemplation of bankruptcy, with a view to give a preference to a particular creditor from whom he had lately borrowed a considerable sum of money, made an assignment to him of two leases, and of two thirds of his stock in trade, and immediately became a bankrupt. The creditor brought his bill against the assignee under the commission, to make him account, and Sir *Joseph Jekyll*, Master of the Rolls, decreed in his favour (*k*). In the other case, a trader, who was indebted to his mother, assigned to her part of his stock, and held a meeting of his creditors on the same day, at which meeting it was agreed that he should commit an act of bankruptcy, which was done accordingly, yet *Lord Mansfield* held the assignment valid (*l*). These decisions took place before the subject had undergone so much discussion, and the principles on

(*k*) *Small* v. *Oudley*, 2 P. Wms. 427; 1 Burr. 480. S. C. See 4 Burr. 2240, and Cowp. 124, where *Lord Mansfield* says he thinks this case extremely shaken by *Linton* v. *Bartlett*; and see that case cited, *ante*, 209.

(*l*) *Hooper* v. *Smith*, 1 W. Bla. 441.

which such cases are decided had been so clearly defined and settled as they have since been; and there can be but little doubt that similar cases arising at the present day would be differently decided.

If a bankrupt give a preference to a creditor from fear of his resorting to legal process for the recovery of his debt, it will be valid, and it makes no difference that the apprehension is groundless (*m*).

Goods had been purchased by a trader to a large amount, for another, and placed in the Custom-house in the name of the trader; and he had deposited a bill of exchange with his employer as a security, which bill proving a forgery, the employer insisted that the property should be immediately transferred to him, which was done. Two days afterwards an act of bankruptcy was committed by the trader; this was ruled by *Lord Ellenborough* not to be a voluntary preference (*n*). And where a trader, in contemplation of bankruptcy, and without solicitation, put three cheques into the hands of his clerk, to be delivered at a creditor's counting-house, which was done accordingly, but, before the delivery of the cheques, the creditor called upon the trader and demanded payment of his debt; *Lord Ellenborough* held that the intention to give a voluntary preference not being consummated, this was a valid payment (*o*). And where a creditor, knowing his debtor to be in distressed circumstances, and not able to pay the debt, applied to him in the first instance, about two months before his bankruptcy, for a security, and took part of his stock

(*m*) *Thompson* v. *Freeman*, 1 T. R. 155.

(*n*) *De Tastet* v. *Carroll*, 1 Stark. 88.

(*o*) *Bayley* v. *Ballard*, 1 Campb. 416.

in trade for the purpose of securing the debt, it was held not to be an undue preference, though the creditor did not threaten to sue the trader in case of a refusal to pay. *Lord Kenyon*, in giving judgment, observed that the bankrupt had sworn to the honesty of the transaction, and that he did not meditate a bankruptcy at the time; and that the jury by their verdict had negatived the idea of collusion (*p*). But where the acceptor of a bill of exchange, two days before the time when the bill became due, called upon the drawer, and informed him privately that he was insolvent, and the drawer insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, if they agreed to a composition, on which the acceptor paid the bill, and became a bankrupt four days afterwards; and it appeared at the trial of an action subsequently brought by the assignees of the acceptor against the drawer for money had and received, that the date of the bill had been altered so as to make it fall due before this transaction, but it did not appear that the alteration was made with the drawer's knowledge, the Court of Common Pleas held that this was a sufficient proof of a fraudulent preference to defeat the payment of the bill; and the case was distinguished from that last cited, because there the creditor came to the debtor, and the security was taken for a debt at that time actually due (*q*). And where a trader, being pressed by creditors for payment or security, one or other of which they said they were determined to have, gave

(*p*) *Smith* v. *Payne*, 6 T. R. 152.

(*q*) *Singleton* v. *Butler*, 2 Bos. and Pul. 283.

a bill of sale of the whole of his stock, and immediately left his home and business, and became a bankrupt, the Court ruled this to be a fraudulent preference, *Lord Ellenborough* observing, that "taking the conversation between the creditors and the bankrupt to be a threat of process if they did not receive payment or security for their demand, he did not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up business, and leave home. This would rather show that he did not make the transfer by dint of the threat, for he did not redeem himself even from any present difficulty by doing the act, which is the motive of such an act when really done under the pressure of a threat" (*r*). But if a debtor, at the desire of his creditor, give goods out of his shop, in part-payment of a bond not then due, and soon afterwards become a bankrupt, the mere circumstance of the bond not being due will not vitiate the payment on the ground of fraudulent preference (*s*). Whether any particular transaction has taken place in contemplation of bankruptcy is a question for the jury to decide; and it is not enough that the act has the effect of contravening the bankrupt-laws; it must be done with intent to contravene them, and in contemplation of bankruptcy, otherwise the transaction will not be invalidated (*t*).

(*r*) *Thornton* v. *Hargreaves*, 7 East, 544.

(*s*) *Hartshorn* v. *Slodden*, 2 Bos. and Pul. 582; and see *Crosby* v. *Crouch*, 11 East, 256, accord. 2 Camp. 166, S. C.

(*t*) *Fidgeon* v. *Sharpe*, 5 Taunt. 539; *Dixon* v. *Baldwen*, 5 East, 175.

A person who resides and trades in *India*, and is at the same time a trader in *England*, making, during his residence in *India*, an assignment of all his property, in trust for all his creditors, according to several proportions agreed upon between the parties, afterwards comes to *England*, and commits an act of bankruptcy here; the transaction in *India* being done fairly and honestly will not be invalidated by the subsequent bankruptcy here (*u*).

If an act of bankruptcy be committed by one of two partners, and a commission of bankrupt issue against him, and the other partner afterwards deliver goods of the joint property to a creditor in satisfaction of debts antecedently due to him from the partnership, and then die, the creditor will become tenant in common with the assignees of the bankrupt partner (*x*).

Where a trader, having been arrested, executes, either to the creditor who arrests him, or to another creditor who becomes bail for him, a bill of sale of all his stock in trade and effects, to pay his debt to the creditor, and the overplus to be paid over to himself, it is an act of bankruptcy; and the stock in trade and effects will vest in the assignees of the bankrupt (*y*).

(*u*) *Ingliss* v. *Grant*, 5 T. R. 530.

(*x*) *Smith* v. *Oriell*, 1 East, 368.

(*y*) *Butcher* v. *Easto*, Dougl. 295; *Newton* v. *Chantler*, 7 East, 138.

CHAP. X.

Of Sales and Purchases by Agents, Brokers and Factors.

IT frequently happens that contracts of sale are entered into by the intervention of third persons, who act as agents for one or both of the parties. When such agents act within the scope of the authority committed to them, their principals are equally bound by the acts of the agents as by their own. The legal maxim, *qui facit per alium facit per se*, is applicable to this case. There are however many cases in which it is a matter of some doubt whether the acts of the agent will bind the principal. This chapter will be chiefly devoted to the object of ascertaining the law of principal and agent in contracts of sale, as far as third persons are concerned. The particular duties and rights of principals and agents, with respect to each other, are not within the scope of this treatise (*a*).

The agents usually employed in mercantile transactions are either *factors*, who are intrusted with the possession as well as the disposal of commodities, or *brokers*, who are merely employed in making contracts relative to goods, but have not the possession of them.

No particular mode of appointing an agent for the

(*a*) See the general law relative to principal and agent, fully and clearly stated in Mr. Paley's valuable treatise on the subject.

purpose of making sales of personal property is required; a mere parole retainer by the principal is sufficient.

Where a master has been in the habit of employing a servant or agent to purchase goods for him on credit, those of whom the agent has purchased goods may by that circumstance be induced to give him credit on other occasions, and to rely on the master for payment. It would therefore be unreasonable for the master to be divested of his responsibility on a particular occasion, by secretly giving orders to the servant not to purchase on credit. The law on that account holds him liable to the seller in such case. The rule is thus stated by *Lord Chief Justice Holt*: "If a man send his servant with ready money to buy goods, and the servant buy upon credit, the master is not chargeable; but if a servant usually buy for the master upon tick, and the servant buy some things without the master's order, yet if the master were trusted by the trader, the master is chargeable (*b*)." And where a dealer in iron sent a waterman to purchase iron of another person on trust, and afterwards paid for the iron, and then sent the waterman a second time with ready money, who received the goods but did not pay for them, on an action being brought for the iron delivered the second time the principal was held liable (*c*). But if the master never has had any dealings with a tradesman, but the dealings have always been with the servant, whom the master has regularly paid, the master will not be liable; as, where an action was

(*b*) Shower, 95; 10 Mod. 111, accord. *Southby* v. *Wiseman*, 3 Keb. 625, accord.

(*c*) *Hazard* v. *Treadwell*, Strange, 506.

brought for oats and hay furnished for the defendant's horses, the plaintiff having had no dealings with the master, but with the coachman, to whom the master gave money monthly for the purpose of buying hay and corn, and the plaintiff had not applied to the master for payment for some years, during which the account was running, *Lord Kenyon* ruled at *Nisi Prius* that the master was not liable (*d*).

And in another case at *Nisi Prius* (*e*), it was said by the same noble and learned Judge, that "nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money the master will not be liable to pay it again; but if the master employ his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit." And where a master is in the habit of paying ready money for part of the goods furnished by a tradesman to his servant, it is sufficient notice to the tradesman that the master considers those goods only as furnished to his family, and it is incumbent on the tradesman to satisfy himself that the goods are really for the family; and if he suffer his goods to be delivered to a servant without payment, and without informing the master, if the goods do not in fact come to the master's use, he will not be liable to pay for them (*f*).

In a later case at *Nisi Prius* before *Lord Ellen-*

(*d*) *Kendal* v. *Andrews*, Esp. Ni. Pri. 141.

(*e*) *Stubbing* v. *Heintz*, Peake, 47. See *Bolton* v. *Hillersden*, 1 Ld. Raym. 324; Peake, Ev. 250.

(*f*) *Pearce* v. *Rogers*, before Lord *Eldon*, at Ni. Pri. 3 Esp. 214.

borough (*g*), the following rule was laid down by his Lordship: "The general rule to subject the principal to the act of his agent is this—the agency must be antecedently given, or be subsequently adopted. There must, in the latter case, be some act of recognition; but if I authorize a man to obtain credit on my account, and he gets the goods on such credit, unless I have paid him I am myself liable: but I go further; for if the goods were taken up, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant has not paid over the money; for he has given the servant authority to take up goods on credit." The facts of the case were, that the plaintiff had delivered a quantity of hay and corn at the defendant's stables, but had never either seen the defendant, received any orders from him, or been paid any money by him. The defendant had been in the habit of keeping a book with his coachman, in which book were entered the articles bought by the latter, and the sums advanced to him; and the money advanced to him was paid generally, and not specifically appropriated to the payment of particular items. The defendant had in fact given the coachman money to pay the plaintiff's demand, which the coachman had embezzled. *Lord Ellenborough* said, that "if the servant was always in cash before-hand, to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant was not so in cash, he gave him a right to take up the goods on

(*g*) *Rusby* v. *Scarlett*, 5 Esp. 76.

credit, and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant." The jury found a verdict for the plaintiff.

A commission to a factor to sell goods authorizes him to give credit in those trades in which credit is usually given (*h*). But a broker employed to transfer stock cannot sell it upon credit without an express authority from his employers for that purpose, although acting *bonâ fide* and with a view to the interest of his principal, because transfers of stock are usually made for ready money only (*i*). If there be no usage to give credit, and a factor, on a general authority to sell, sell upon credit, the factor alone will be liable to the vendee; and unless such sale be in *market overt*, the property in the goods is not changed, nor even in *market overt*, if the vendee know that the vendor sells as factor (*k*).

A broker who does not disclose his principal may vary the terms of payment after the sale is completed; but when the principal is disclosed, the broker is no longer authorized to alter the terms of the contract (*l*).

We have already seen, that when a servant, who is employed by his master to sell a horse, warrants him sound, the master is bound by the warranty, although the servant has no particular authority to warrant the horse (*m*); and though it has been said that the owner would not be bound by the warranty of his servant,

(*h*) 12 Mod. 514. *Scott* v. *Surman*, Willes, 407.

(*i*) *Wiltshire* v. *Sims*, 1 Campb. 258.

(*k*) 12 Mod. 515.

(*l*) *Blackburn* v. *Scholes*, 2 Campb. 343.

(*m*) *Alexander* v. *Gibson*, 2 Campb. 555; *Helyear* v. *Hawke*, 5 Esp. 72.

whom he had authorized to sell a horse, with an express direction not to warrant, yet that case has been doubted by *Lord Kenyon*. In the same case the following distinction was taken by Mr. *Justice Ashhurst*, between a general and a particular agent: "If a person keeping livery-stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment (*n*)." And in a subsequent case at *Nisi Prius* before *Lord Kenyon*, which was an action brought by the *East India* Company, to recover damages for a loss arising from a re-sale of silks which had been sold by the Company, at one of their sales, to the defendant, the defence set up was, that the silks had been bought by a broker, to whom the defendant had given orders to buy the best *Bengal* raw silk, and that the silk was not raw silk, not of the best quality. *Lord Kenyon* took a distinction between a general and a special agent; that in the first case a principal must be bound by all his acts, whereas in the latter he is only

(*n*) *Fenn* v. *Harrison*, 3 T. R. 760, 761.

bound while the agent acts within the scope of his authority; and that if the defendant could prove that he had so specially authorized the broker to bid for him for best *Bengal* silk, and this turned out not to be of that description, that he should not be bound by the contract so made without his authority (*o*).

It is often difficult to decide whether a particular transaction falls within the scope of an agent's authority. Where indeed an agent is employed to act generally in all matters concerning his principal, the latter will undoubtedly be bound by all the acts of the agent; but if the agent have been employed in the purchase of a particular sort of goods only, it seems to be going very far to say that a purchase by him of goods of quite a different sort can be held to be a transaction within the scope of his authority, and as such, to be binding on his employer. Yet this liability appears to be established by an old case, which is reported as follows: "If one be factor for a merchant to buy one kind of stuff, as tin, and the said factor hath not used to buy any other kind of wares but this kind only, for his master; if now the said factor buy silk, or any other commodities for his master, and assume to pay money for that, the master shall be charged in an *assumpsit* for the money, and for that let the master take heed what factor he makes (*p*).

If a factor, having a general power to sell, sell for a less price than his commission directs, the sale is nevertheless valid against his principal (*q*).

(*o*) *East India Company* v. *Hensley*, 1 Esp. 112.

(*p*) *Pettiesv. Soam*, Gouldsb. 138.

(*q*) Ambler, 497, 498.

Though a special agent, acting under a limited authority, cannot bind his principal if he exceed his authority, and if he be expressly limited as to price, will not be authorized to go beyond the limitations, yet, though a price be specified by his employer, if he be at liberty to exceed it, he cannot be considered as a special agent, and his principal will be bound by his act, though he give a higher price for goods than the price mentioned by the principal (*r*).

Though a man act as agent for another without authority, yet the principal may, if he please, by a subsequent assent, adopt the acts of the agent (*s*).

When any individual has, by the consent of another, assumed the character of his agent, he becomes at once a complete representative of his principal, and the principal will be equally bound by any representations or admissions made by the agent as if they had been made by himself, provided such representations or admissions be made by the agent respecting matters which fall within the scope of his agency. Thus the representations which are made by an agent respecting a sale of coals then about to take place, and which coals he is authorized to sell, may be given in evidence in an action against the master, to recover a penalty for selling coals short of measure; but what he might have said respecting a former sale, or on another occasion, would not be evidence against his principal (*t*).

It is always in the power of the principal to with-

(*r*) *Hicks* v. *Hankin*, 4 Esp. 114.

(*s*) Ld. Raym. 930; 2 Salk. 442.

(*t*) *Peto* v. *Hague*, 5 Esp. 134. And see *Helyear* v. *Hawke*, 5 Esp. 72, accord.

draw a bare authority with which he has intrusted an agent, and he will not be liable on any transaction entered into by the agent, who has knowledge that his authority is revoked with any person possessed of the same knowledge. But where the agent lives at a distance, and acts under a power of attorney from his principal, a question may arise on the validity of transactions by the agent, after the principal has in fact revoked his authority, but before the knowledge of such revocation has reached the agent. It seems that in such a case the principal could not avoid the acts of his agent done *bonâ fide*, if they were to his disadvantage, but that he might consent to avoid those which were for his benefit (*u*). With respect to persons with whom the agent has been in the habit of dealing for his principal, the latter will be bound by the acts of the former, notwithstanding the revocation of his authority, if the persons with whom the agent deals have no notice, or are not in some way informed of the revocation (*x*). The authority of a broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him, pursuant to the statute of frauds, although he has previously entered into a verbal agreement to sell the goods (*y*). The time of revocation of a general authority to a broker to sell may be determined by the usage of trade; and a usage, by which the authority of a broker in the *Irish* provision trade expires

(*u*) Per *Buller*, J. in *Salte* v. *Field*, 5 T. R. 215.

(*x*) ——— v. *Harrison*, 12 Mod. 346; *Hazard* v. *Treadwell*, Str. 506, ante; Bac. Abr. tit. Master and Servant, K.

(*y*) *Farmer* v. *Robinson*, 2 Campb. 339. See *Warwick* v. *Slade*, 3 Campb. 127.

on the day on which it is given, has been held a lawful usage (*z*).

Where a factor at the time of a purchase does not disclose the name of his principal, but the unknown principal is afterwards discovered, he becomes liable on the contracts of the factor; but if the vendor knowing at the time of the sale the name of the principal, chooses to give credit to the factor, he cannot afterwards have recourse to the principal (*a*). But where *A.*, a foreign merchant, employed *B.* to purchase goods on commission, and the vendors, with knowledge that the goods were intended for *A.*, made out invoices to *B.*, and took in payment his acceptances, payable at six months, the Court of *King's Bench* held, that there was no contract of sale between *A.* and *B.*; and that even if such contract existed, *B.* could not maintain an action against *A.* till the expiration of six months (*b*).

Where a bankrupt carried on the business of a coachmaker for the benefit of his assignees, and was supplied with varnish *in his own name*, he was nevertheless considered as an agent, and the assignees were held liable to pay for the goods (*c*).

A person acting in a public situation, as an agent for government, is not answerable personally on contracts made by him on account of government. Thus the governor of *Quebec*, who had given orders for cer-

(*z*) *Dickinson* v. *Lilwall*, 4 Campb. 279; 1 Stark. 128, S. C.

(*a*) *Paterson* v. *Gandassequi*, 15 East, 62; *Addison* v. *Gandassequi*, 4 Taunt. 574, accord. See *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*, 4 Taunt. 576, note.

(*b*) *Seymour* v. *Pychlau*, 1 Barn. & Ald. 14.

(*c*) *Kinder* v. *Howarth*, 2 Stark. 354.

tain quantities of corn and grease to be furnished for the use of the lieutenant-governor commanding a fort within his province, was held not to be personally liable for the price of the goods (*e*); and an action against a commissary, for forage for the army, brought by a person who had been employed by the commissary in that office, was held not to lie (*f*); nor does it make any difference that the contract entered into by the agent for the Crown is by deed (*g*). The captain of a troop of horse, during the time of his absence, and while another officer is in the actual command of it, by whom the orders for subsistence are issued, and the subsistence-money is received from government, is not liable to pay for subsistence furnished to the men, though he be still entitled to a profit upon the sums issued on that account, and the troop still continue under his command (*h*). And though he be present with his troop he will not be personally liable for forage furnished by the orders of a clerk appointed by him, but who received his orders from whatever officer happened to be in the command. But if the captain receive money from the paymaster of the regiment, to whom it is issued by government, and on whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month, he will be liable to the person furnishing the forage, in an action for money had and received, to the amount of the sum so received

(*e*) *Macbeath* v. *Haldimand*, 1 T. Rep. 172.

(*f*) *Lutterloh* v. *Halsey*, 1 T. Rep. 180.

(*g*) *Unwin* v. *Wolseley*, 1 T. Rep. 674.

(*h*) *Myrtle* v. *Beaver*, 1 East, 134.

from the paymaster (*i*). And where, under similar circumstances, an action had been brought against the colonel of the same regiment, for forage furnished to his own troop, and a verdict found for the plaintiff, though it appeared that the defendant had not drawn upon the paymaster for the particular sum in demand, and so could not be said to have received that sum to the plaintiff's use, yet the defendant being indebted to the paymaster on the balance of his own private account, to the amount of two thirds of the plaintiff's demand, and being surety for the paymaster to government, and the paymaster having absconded in a state of insolvency, the Court of *King's Bench* refused to set aside the verdict, as the defendant was liable, in some shape or other, for the paymaster's default, and justice had on the whole been done by the verdict (*k*).

Whether or not an agent shall incur a personal liability to those with whom he deals, in all cases depends on the fact whether credit was given to him by the seller at the time of the sale. "If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only; so if they were ordered for another person, and the tradesman refuses to deliver to such person's credit, but to his only who orders them, there is then no pretext for charging such third person; or if the

(*i*) *Rice* v. *Chute*, 1 East, 579.

(*k*) *Rice* v. *Everitt*, 1 East, 582.

goods are ordered to be delivered on account of another, and after delivery the person who gave the orders refuses to inform the tradesman who the person is, in order that he may sue him, under such circumstances he is himself liable; but wherever an order is given by one person for another, and he informs the tradesman for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable" (*l*).

In an action for the non-delivery of goods, it appeared that the defendant had entered into and signed a written contract, engaging to deliver certain goods to the plaintiff, which he had failed to do. The defence was, that the defendant was merely a factor, and that this was known to the plaintiff before the action was brought, although subsequent to the contract. *Lord Ellenborough* was of opinion that the defendant was liable, the principal not having been notified at the time, and no subsequent act having been done to show that the plaintiff waved the liability of the defendant, and relied upon the principal (*m*).

If a factor employed by a principal resident abroad, buy or sell goods for him here, an action will lie against or for him in his own name, for the credit will be presumed to be given to him in the first case, and in the last, the promise to be made to him (*n*).

(*l*) *Per* Lord Kenyon, in *Owen* v. *Gooch*, 2 Esp. 568.

(*m*) *Morgan* v *Corder*, Paley's Princ. & Ag. 250.

(*n*) *Gonzales* v. *Sladen*, Bull. N. P. 130. And see the Observations of *Eyre*, Ch. J. in *De Gaillon* v. *Victoire Harel L'Aigle*, 1 Bos. & Pul. 368.

But though a person merely acting as agent do not thereby make himself personally responsible, yet he may incur a personal responsibility by consenting by his own voluntary act to become liable. Thus, in an old case, where a servant had bought fat beasts for the use of his master, and made a bill, acknowledging the receipt of the beasts to his master's use, and by the same bill bound himself to payment on a certain day, he was held liable to pay for the beasts (*o*).

We have already seen (*p*), that if a stranger be sent to a fair to sell a horse, with orders not to warrant him, and he nevertheless do warrant him, the owner of the horse will not be liable to the buyer on such warranty, because the person selling was not acting within the scope of his commission. In such case the servant would himself be liable on the warranty.

Where a captain of a ship contracts for necessaries for the ship, though he acts as agent for the owners, and is known to the other contracting party to do so, both he and the owners are liable on the contract for necessaries; and if the owners let the ship to the master for a term of years, and covenant that he shall have the sole management of the ship, and employ her for his sole benefit and advantage, and he covenant on his part that he will, at his own cost, repair the vessel, the owners are nevertheless liable for necessaries furnished for the vessel by order of the master, though without their knowledge, and without their being personally known to the person who sup-

(*o*) *Alford* v. *Eglisfield*, Dyer, 230. b.

(*p*) 3 T. Rep. 761, *ante*, 222.

plied the necessaries (*q*). It was observed by *Lord Mansfield*, in giving judgment in this case, that "if it had appeared that a tradesman had notice of such a contract, and in consequence of it gave credit to the captain individually, as the responsible person, particular circumstances of that sort might afford a ground to say he meant to absolve the owners, and to look singly to the personal security of the captain." But where goods were ordered for a ship by the owners, before the appointment of a captain, and some of them were delivered before, and the rest after the appointment of the captain, as no personal credit was given to the captain, he was held not to be answerable for any of the goods (*r*). And if it appear in any case that the credit was given to the owners alone, and that the master merely acted in the transaction as their servant, he will not be liable (*s*).

The authority of a broker to bind his principal is not in all cases confined to the power which the principal intended to confer on him. The interests of the mercantile world require that he should bind his principal within the limits of the authority with which he has been apparently clothed by him in respect of the subject-matter of the sale. Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. Thus, where *Pickering*, a purchaser of hemp at

(*q*) *Rich* v. *Coe*, Cowp. 636.

(*r*) *Farmer* v. *Davies*, 1 T. Rep. 108.

(*s*) *Hoskins* v. *Slayton*, Cas. temp. Hardw. 376.

wharfs in *London*, had his hemp at the time of the purchase transferred into the name of *Swallow*, the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp, this was held to give *Swallow* an implied authority to sell it, and his sale, and receipt of the price, bound his principal, *Pickering*: and the law was held to be the same as to another parcel transferred into the names of *Pickering* or *Swallow* (*s*). And where brokers had been in the habit of buying and paying for, and of selling and receiving, the price of sugars on speculation, in their own names, and upon their own judgment, for their principal; sometimes, when the markets were low, under an unlimited authority as to quantity and price, at other times under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect of price, and advised from time to time by their principal, as to the probable rise or fall of the markets, but keeping only a general account with their principal of the sums advanced to and received from him, without accounting separately for each lot purchased and re-sold; they were held authorized to bind their principal by a re-sale of a particular parcel of sugars before purchased, and paid for in their own names, and lodged in their own warehouse, though sold under the price directed by their principal; for the general authority of brokers to sell so as to bind their principal is to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods (*t*). But if

(*s*) *Pickering* v. *Busk*, 15 East, 38.

(*t*) *Whitehead* v. *Tuckett*, 15 East, 400.

the owner of goods send them to a wharf, to remain till they shall be sold, and the wharfinger, without any authority from the owner, sell the goods, no property will pass by the sale to the vendee; and it makes no difference that the wharfinger was accustomed to sell the same sort of goods from the wharf (*u*).

An agent selling the property of two principals for one entire price will be liable to the buyer as a principal. Thus, where an agent sells a horse belonging to *A.*, and another to *B.* for one price, with a warranty, *A.* is not liable in an action by the seller, on a breach of the warranty, but the agent only is answerable (*x*).

Though it is laid down in *Brooke's* Abridgment (*y*), that if a servant sell false stuff an action on the case will not lie against the master, unless he sold it through his covin, or by his command; yet it seems, from a later decision, that a man may be held answerable *civilly* for the fraudulent acts of his agent. That was an action on the case for deceit, in the sale of silk bought by the plaintiff, of the defendant, which was stated to have been bought as silk of one sort, and to be in fact of another sort; it appeared in evidence that there was no deceit in the defendant who was a merchant, but that it was in his factor beyond sea, and the doubt was, if this deceit would charge the defendant. *Lord Chief Justice Holt* thought him answerable for the deceit of the factor; for seeing somebody must be a loser by this deceit, it was

(*u*) *Wilkinson* v. *King*, 2 Campb. 335.

(*x*) *Symonds* v. *Carr*, 1 Campb. 361.

(*y*) Action on the Case, pl. 8.

more reasonable that he who employed and trusted the deceiver should be a loser, than a stranger (*z*).

The authority which a factor has to *sell* the goods of his principal does not authorize him to barter them for other goods; and if he in point of fact barter the goods, and deliver them, and receive other goods in exchange, no property passes by the delivery, and the owner of the goods may maintain an action of trover for them against the person to whom they are bartered and delivered, though he did not know that he had been dealing with a person who was merely a factor. But it seems that if it had been a sale in market overt, it would have bound the seller (*a*).

CHAP. XI.

Of Payments.

THE investigation of the law relative to the sale of personal property, in the order which seemed most natural and perspicuous, has at length brought us to the last subject which we propose to consider, namely, the time and manner in which payment for the goods is to be made.

The vendee is in general bound to pay for goods in money at the time of taking them away; but both

(*z*) *Hern* v. *Nichols*, 1 Salk. 289; 3 Atk. 47, accord.; *Jones* v. *Hart*, 2 Salk. 441, accord.

(*a*) *Guerreiro* v. *Peile*, 3 Barn. & Ald. 616.

the mode and time of payment are subject to whatever particular stipulations the parties may choose to agree upon; and it is very usual for the vendor to give the vendee credit for a certain time, and to agree to receive in payment bills of exchange, either drawn or accepted by the vendee, and payable at a particular time. Where goods are to be paid for by a bill of exchange, and the vendor directs the vendee to send a bill by the post, and the bill is so transmitted by the vendee, he will be discharged, though the bill should happen to fall into bad hands, and the amount of it should be received by a third person at the banker's where it was to be paid; and even if there had been no particular direction from the vendor, the law would have been the same, this being the usual way of transacting such business (*b*). But where a person in *London* is directed to remit money by the post, he ought either to put it into the post-office in *Lombard Street*, or deliver it at one of the receiving-houses appointed by the post-office; and if he give it to a bellman in the street he will be answerable in case of its miscarriage (*c*).

Many questions have arisen in our courts of law respecting payments made for goods in bills of exchange or promissory notes, and the circumstances under which such payments shall bind the party receiving the bills or notes. It is laid down in an old case, that where a bill is taken in payment at the time of the sale it will be an absolute payment; but where there is a precedent debt, the giving of a bill or note is

(*b*) *Warwicke* v. *Noakes*, Peake, 67. a.

(*c*) *Hawkins* v. *Rutt*, Peake, 186.

only a conditional payment, that is to say, payment, if the bill or note should be duly honoured; it seems, however, now to be understood, that unless the person to whom the payment is made agree to take the notes as money, and to run the risk of their being paid, it will not be considered a payment unless the notes be afterwards paid. If the party receiving a note keep it by him an unreasonable length of time, and the person who was to pay it becomes insolvent, he that received it must bear the loss (*d*).

A. sold goods to *B.*, for which the latter was to pay in three months by a bill at three months; a few days after the expiration of three months *B.* gave to *A.* a cheque on his bankers (who were also the bankers of *A.*) requiring them to pay *A.* on demand in a bill at 70 days, and *A.* paid the cheque into the bankers hands, and took no bill from them, but the amount was transferred in the bankers books from *B.*'s account to *A.*'s, with the knowledge of both; the bankers having failed before the time when the bill which was originally intended to be given would have become due, a question arose whether *A.* could recover the value of the goods against *B.*, and the court of *King's Bench* held that it was a valid payment, and that *A.* could not recover (*e*).

(*d*) *Ward* v. *Evans*, 2 Lord Raym. 928; 2 Salk. 442; 1 Com. 138; and 6 Mod. 36. *Owenson* v. *Morse*, 7 T. R. 64. See Str. 415, 16. 508. 550. 6 T. R. 52. 8 T. R. 451. 2 Bos. and Pul. 518.

(*e*) *Bolton* v. *Richard*, 6 T. R. 139. See *Bolton* v. *Reichard*, 1 Esp. 106, which seems to be a report of the same case at *Nisi Prius*; Lord *Kenyon* is there stated to have ruled, that where a person in payment of goods gives an order to pay the bearer the amount in good bills on London, and the party takes bills for the amount, he does it at his own risk. *Quære*; for this doctrine does not seem consistent with the cases stated above.

In general, if a creditor prefer a bill of exchange, accepted by *a third person*, to ready money, from his debtor, he must abide by the hazard of the security; but if an *agent of the debtor* offer the creditor payment in cash, or by a cheque on his banker, and the creditor prefer the cheque, this will not discharge the debtor if the cheque be dishonoured, although the agent failed with a balance of his principal in his hands to a larger amount (*f*).

By stat. 3 & 4 Ann. c. 9, s. 7, "if any person accept a bill of exchange in satisfaction of any former debt it shall be accounted a full payment of such debt, if such person accepting of such bill do not take his due course to obtain payment of the bill by endeavouring to get it accepted and paid, and making his protest for non-acceptance or non-payment thereof." This statute applies only to persons whose names are on the bills; therefore where the seller of goods, with the consent of the purchaser, drew a bill of exchange for the price of the goods upon a third person, who was indebted to the purchaser, which bill was accepted, but when it was presented for payment was dishonoured, the purchaser was not entitled to notice of the dishonour of the bill (*g*).

Taking a bill in payment from the ostensible partner in a firm, which bill is afterwards dishonoured, will not prevent the creditor from suing an unknown partner for the debt when he is discovered (*h*).

Where goods are delivered under an agreement

(*f*) *Everett* v. *Collins*, 2 Campb. 515; and see *Tapley* v. *Martins*, 8 T. R. 451; *Marsh* v. *Pedder*, 4 Campb. 257.

(*g*) *Swinyard* v. *Bowes*, 5 Ma. and Selw. 62.

(*h*) *Robinson* v. *Wilkinson*, 3 Price, 538.

to take a specific parcel of copper halfpence in payment, a delivery of the halfpence will prevent the seller's supporting an action for the price of the goods, though the larger number of the halfpence prove counterfeit (*i*).

We will next consider under what circumstances payments to factors, agents or servants, will be held to bind their principals. If a man send his servant to receive money for him, the servant has no authority to take a note instead of money; but a subsequent assent by the master will be equivalent to a precedent authority (*k*).

Where a master sent his servant, who was accustomed to transact affairs of that nature for him, on Saturday morning, with a note drawn on Sir *Stephen Evans*, with orders to get from Sir *Stephen* either bank-bills or money, and change them for exchequer-bills, but the servant, to save himself the trouble of going to Sir *Stephen Evans*, went to *B.* and prevailed on him to give him a bank-bill for the note on Sir *Stephen*, and then purchased the exchequer-bills with it, and Sir *Stephen Evans* having failed on the following Monday, a question came before the Court whether the loss of the note on Sir *Stephen* should fall on the master, or on *B.*, the Court held that the loss should fall on the master, on the ground that the servant had a general authority; and they said, that if this general authority should be liable to be determined for a time, by any particular instructions

(*i*) *Alexander* v. *Owen*, 1 T. R. 225.

(*k*) *Ward* v. *Evans*, 2 Lord Raym. 928; 2 Salk. 442; 1 Com. 138; and 6 Mod. 36. See also *Thorold* v. *Smith*, 11 Mod. 87.

or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master (*l*).

Where a factor sells the goods of his principal in his own name, and makes the buyer debtor to himself, he has a right to receive the price; he may support an action for it against the buyer; and it will be no defence to such action for the buyer to say that the principal is indebted to him in more money, except in cases where nothing is due from the principal to the factor; and where a factor who had become surety for his principal, for money borrowed by him, upon an engagement by the principal to send the factor all the goods he should make of the money borrowed, sold goods in his own name, but the goods were marked with the name of the principal, and the purchaser knew that the seller sold the goods as factor, and after an act of bankruptcy committed by the principal, and notice by his assignees to the purchaser not to pay the price of the goods to the factor, the purchaser did nevertheless pay it to the factor, the Court of *King's Bench* held him warranted in so doing (*m*).

If the owner of goods allow his broker to sell them as a principal, the purchaser will be discharged by paying the price of the goods to the broker (*n*). And if the principals, on some occasions, allow their brokers to draw bills in their own name for goods which they have sold on their account, they are bound by a payment made to the brokers by a purchaser (*o*).

(*l*) *Nickson* v. *Brohan*, 10 Mod. 109.

(*m*) *Drinkwater* v. *Goodwin*, Cowp. 251.

(*n*) *Coates* v. *Lewes*, 1 Campb. 444.

(*o*) *Townsend* v. *Inglis*, Holt N. P. C. 278.

And where goods are sold by a broker for a principal not named, upon the terms of "payment in one month, money;" which terms are specified in the bought-and-sold notes, handed over to the respective parties by the broker, a payment made to the broker within the month, by a bill of exchange, accepted by the buyer, and discounted by him within the month, is good; but the buyer being also indebted to the same broker for another parcel of goods belonging to other persons, and accepting the bill for a larger sum than either of the parcels of goods alone amounted to, though not for a sum large enough to cover both demands, and there being no specific appropriation of the payment to either of the debts, it was held, that on the broker stopping payment the payment for the goods ought to be equitably apportioned between the several owners of the goods sold, and that they were respectively entitled to recover the difference from the buyer (*p*). In this case the Jury were of opinion that the stipulation in the contract of "a month, money," meant, in the understanding of commercial men, payment at any time within a month, and that the payment in question within the month to the brokers, with whom the defendant had dealt, without the knowledge of their principal, was a good payment to bind their principal.

If a creditor take the security of the agent of his debtor in payment of the debt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals in any manner differently with the

(*p*) *Faven* v. *Bennett*, 11 East, 36.

agent on the faith of the receipt, the principal is discharged though the security fail. But the principal is not exonerated from the payment if he cannot show that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in time (*q*).

A tender of money to an agent authorized to receive payment is as good as a tender to the creditor in person (*r*). The demand of a debt to do away the effect of a tender must be made by some one authorized to give the debtor a discharge (*s*).

The plaintiff, a farmer in the country, sent oats to *London*, consigned to his factor. The custom of the trade had formerly been that the factor had 4 *d.* per quarter for selling, and gave immediate notice to the farmer of the name of the buyer, and of the price; but it had for many years been customary for the farmer to allow 2 *d.* per quarter more, upon the factor taking upon himself the risk of the debts, since which time they had ceased to inform the buyers. The oats in the present case were sold, but the factor failing, the plaintiff (before payment) gave notice to the defendant (the buyer) not to pay the factor, which he did notwithstanding, and thereupon the action was brought. *Lord Chief Justice Lee* thought that this new method had not deprived the farmer of his remedy against the buyer, provided there was no payment to the factor; that the only reason of advancing 2 *d.* per quarter was, to have both at stake,

(*q*) *Wyatt* v. *The Marquis of Hertford*, 3 East, 147.

(*r*) *Goodland* v. *Blewith*, 1 Campb. 477.

(*s*) *Coles* v. *Bell*, 1 Campb. 478.

and here being notice before actual payment, there could be no harm done; therefore he directed the Jury in favour of the plaintiff. The Jury, however, found for the defendant, and a new trial being afterwards granted, the cause came on to be tried before a special Jury. The *Chief Justice* declared to the Jury, that a factor's sale does by the general rule of law create a contract between the owner and the buyer. The Jury, notwithstanding, found for the defendant; and being asked their reason, declared, that from the circumstances no credit was given as between the owner and buyer, and that the latter was answerable to the factor only, and the factor only to the owner (*t*). It seems impossible to reconcile the finding of the Jury in this case, either with the direction of the learned Judge, or with the general current of authorities upon the subject. It is indeed stated in Buller's *Nisi Prius* (*u*), that perhaps under some particular circumstances the general rule may not take place; as, where the factor sells the goods at his own risk (*i. e.* is answerable to the owner for the price, though it never be paid), for in such case he is debtor to the owner, and not the buyer. It is, however, very difficult to understand how the circumstance of a factor, having a *del credere* commission (*x*) from his employer, can in any way affect the rights or liabilities of third persons in respect of either the principal or the factor; and though some of the cases do seem to attribute an effect to a *del credere* commis-

(*t*) *Scrimshire* v. *Alderton*, Str. 1182.

(*u*) 130.

(*x*) When an agent, in consideration of an additional premium, insures to his principal the solvency of the person to whom he sells the principal's goods, this is called a commission *del credere*.

sion, which is not very intelligible, by which it is supposed to extend its influence beyond the seller and his factor, yet later and more accurate investigation has proved fatal to this anomaly; and the cases which will be quoted in the course of this chapter, will, it is presumed, satisfactorily show, that a *del credere* commission given by a tradesman to his factor will not limit or confine the claims of the principal on any person to whom the factor sells the goods.

In a case where the assignees of a bankrupt were plaintiffs, the defendants, who were factors, had had considerable dealings with the bankrupt, who was an underwriter, on account of various correspondents of the defendants. They had paid to the bankrupt, or were debited by him for, various premiums upon insurance on behalf of their correspondents. Credit was given to them for the losses as they happened, and for the returns of premiums. They had no commission *del credere*, and none of their correspondents were insolvent, but they were in advance to all except one on account of their policies. Under these circumstances the Court held, that the defendants were not entitled to set off losses on the policies which had happened previously to the bankruptcy, in the action which was brought by the assignees for premiums debited to the defendants by the bankrupt (*y*). But it was afterwards held, in the case of *Grove* v. *Dubois* (*z*), that a broker with a *del credere* commission may set off a loss upon a policy happening before a bankruptcy, to an action by the assignees of the bank-

(*y*) *Wilson* v. *Creighton*, 1 T. R. 113.

(*z*) 1 T. R. 112.

rupt, for premiums upon policies of insurance underwritten by him, and for which he had debited the broker. The reason given by *Lord Mansfield* for this decision is, that a *del credere* commission is an absolute engagement to the principal from the broker, and makes him liable in the first instance; that there is no occasion for the principal to communicate with the underwriter, though the law allows the principal, for his benefit, to resort to him as a collateral security. The difficulty, however, of comprehending how the situation of the underwriter with respect to the principal can be varied by what passes between him and his agent, and with which the underwriter is unacquainted, still remains. The propositions above laid down by *Lord Mansfield* have been disapproved of in a late case (*a*) by the Court of *King's Bench*, as tending to reverse the relative situations of principal and factor, and to introduce uncertainty and confusion into the law upon the subject. On a still later occasion (*b*), *Lord Chief Justice Gibbs*, speaking of the case of *Grove* v. *Dubois*, says, "We suppose that case proceeded upon some principle: I wish I could discover that principle. I think the mistake was, to suppose that he who is only liable in the second instance, on the failure of the original debtor, could in any case be considered as the original debtor himself (*c*)." Under the sanction of such high au-

(*a*) *Morris* v. *Cleasby*, 4 Ma. & Selw. 575.

(*b*) *Baker* v. *Langhorn*, 6 Taunt. 521.

(*c*) The following remark of Lord *Ellenborough*, in the case of *Cumming* v. *Forester*, 1 Ma. & Selw. 499, seems to militate against the doctrine laid down in *Grove* v. *Dubois*, though he does not express any intention to over-rule that case:

thority, we may perhaps be justified in regarding the case of *Grove* v. *Dubois* as an anomalous decision, militating against acknowledged principles; and although, perhaps, to be adhered to after having been so long established in cases so closely resembling it as not to be distinguishable, yet not to be extended by analogy to any other cases (*d*).

Where a factor does not disclose his principal, but deals and deliver the goods in his own name, the person with whom he deals may set off a debt due from the factor, in an action brought against him by the principal, for the price of the goods (*e*).

But though the factor sell without disclosing his principal, yet if the principal give notice to the buyer to pay him and not the factor, the buyer will not be justified in afterwards paying the factor (*f*).

If a broker buy goods in his own name, and do not disclose his principal until he has himself become insolvent, the principal will be liable to pay the vendor for the goods, though the broker be indebted to him in a larger amount (*g*).

A person selling goods is not confined to the credit of the broker who buys them, but may resort to the principal on whose account they are bought; and he

"I cannot conceive," says his Lordship, "how a contract between *A.* & *B.* can vary the rights between *B.* and a third person who is a stranger to it, and empower *B.* to set up a claim against him as derived out of that contract."

(*d*) See *Parker* v. *Smith*, 16 East, 382; *Koster* v. *Eason*, 2 Ma. & Selw. 112; *Parker* v. *Beasley*, 2 Ma. & Selw. 423.

(*e*) *George* v. *Clagett*, 7 T. R. 359, and 2 Esp. 557, and the cases there quoted.

(*f*) Bull. N. P. 130. See *Houghton* v. *Matthews*, 3 Bos. & Pul. 485.

(*g*) *Waring* v. *Favenck*, 1 Campb. 85; *Moore* v. *Clementson*, 2 Campb. 22, accord.

is not affected by the state of the accounts between the vendee and the broker; therefore the vendee is liable to the vendor, if called upon when payment becomes due, although he has previously paid the price of the goods to the broker: but if he suffer the day of payment to go by without a demand on the vendee, he will not be permitted to lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods have been paid to the broker the principal will be discharged (*h*). And where a factor made purchases for his principal, who made payments to him on account; and afterwards the factor was pressed for payment by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact paid him the residue, it was held by *Lord Mansfield*, that the principal was liable over to the sellers for the money he had so paid to his factor after notice (*i*). And where the defendant bought goods of the plaintiff in the name and upon the credit of *Smith* & Co., but the purchase was in reality made for himself, he was held liable (*k*). But if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give credit to such agent, he cannot afterwards recover the value against the known principal (*l*).

Where the defendant purchased, as broker for *B.*, the goods of *A.*, for whom he sold them under a *del*

(*h*) *Kymer* v. *Suwercropp*, 1 Campb. 109.

(*i*) *Powel* v. *Nelson*, 15 East, 65.

(*k*) *Railton* v. *Hodgson*, 15 East, 67.

(*l*) *Paterson* v. *Gandasequi*, 15 East, 62. *Addison* v. *Gandassequi*, 4 Taunt. 574.

credere commission, and did not at the time disclose the name of *A.*, but disclosed it soon after, and afterwards paid the price to *A.*, it was held, that in an action by the assignees of *B.* (who had become a bankrupt) to recover the balance on a re-sale of the goods made by the defendant on account of *B.*, the defendant was not entitled to set off the payment made to *A.*(*m*). The law was stated by the Court to be, that till the principal appears the broker is to be treated as the principal, and consequently all payments to him before that time will be good. And it makes no difference that the vendee knows at the time of the sale that the factor sells for an unknown principal, or that he has no *del credere* commission; but a payment to a broker varying from the original terms of the contract is not valid, nor will evidence of a usage to authorize such a variation be admissible (*n*).

The character of a broker is materially different from that of a factor; the latter having the goods consigned to him, and usually selling in his own name, without disclosing that of his principal; but a broker is not intrusted with the goods, and ought not to sell in his own name: therefore if a broker sell goods without disclosing the name of his principal, he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him, against a demand for the price of the goods made by the principal (*o*).

(*m*) *Morris* v. *Cleasby*, 1 Ma. & Selw. 576, and 4 Ma. & Selw. 566. See *Gurney* v. *Sharp*, 4 Taunt. 242.

(*n*) *Campbell* v. *Hassel*, 1 Stark. 233.

(*o*) *Baring* v. *Corrie*, 2 Barn. & Ald. 137.

Upon an agreement between two traders to supply each other with goods for goods, after a balance struck between them, the balance is to be paid in money (*p*).

It often happens that the same individuals have dealings with each other upon different accounts, and that payments are made by one to the other, sometimes with, and sometimes without a declared intention on the part of the person making the payment to apply it to a particular account. In such cases, the party paying may apply the payment to which account he pleases, but in default of his making any specific appropriation, the party receiving may apply it to either account at his option (*q*). It is not, however, necessary that the appropriation should be made at the time of the payment. Where a sum of money was paid at a banking-house, where the party paying it had a subsisting debt, *Lord Kenyon* ruled at *Nisi Prius* that it was a payment of the subsisting demand, and not a deposit to cover future advances (*r*). In a very late case (*s*), the *Master of the Rolls* (Sir *W. Grant*) said, respecting banking-accounts, "In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid that is first drawn out. It is the first item on

(*p*) *Ingram* v. *Shirley*, 1 Stark. 185.

(*q*) *Hawkshaw* v. *Rawlings*, Str. 24; *Goddard* v. *Cox*, Str. 1194; 14 East, 243, n.; *Peters* v. *Anderson*, 5 Taunt. 596; *Bodenham* v. *Purchas*, 2 Barn. & Ald. 39.

(*r*) *Hammersley* v. *Knowlys*, 2 Esp. 666.

(*s*) *Clayton's* case, 1 Meriv. 608; *Bodenham* v. *Purchas*, 2 Barn. & Ald. 39, accord.; *Brooke* v. *Enderby*, 2 Brod. & Bingh. 70, accord.

the debit side of the account that is discharged, or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts."

But although there be no actual appropriation of a payment to a particular account, yet there may be peculiar circumstances from which the intention of the person paying so to apply it may be deduced. As, where security had been given by a surety for goods to be supplied to his principal, and not in respect of a debt previously existing from the principal to the vendor, and payments had been from time to time made by the principal, in respect of some of which discount had been allowed for prompt payment, it was to be inferred in favour of the surety that these payments were intended to be made in liquidation of the latter account (*t*).

It has been held that *interest* is due on the balance of an account from the time that it is stated (*u*); but in a late case, which was an action for money had and received to recover the balance of an account, *Lord Ellenborough* refused to allow the plaintiff interest, till, on inspecting the account, it appeared that interest had been allowed on former balances, which evidenced the mode of dealing between the parties (*x*).

(*t*) *Marryatts* v. *White*, 2 Stark. 101; *Newmarch* v. *Clay*, 14 East, 239.

(*u*) *Blaney* v. *Hendrick*, 3 Wils. 205.

(*x*) *Nichol* v. *Thompson*, 1 Campb. 52; *Chalie* v. *The Duke of York*, 6 Esp. 45, accord.

Where a verdict had been obtained by the vendor in an action on a contract for the sale of goods, in which a particular time was fixed for the payment of the price, and the verdict included interest, the Court of *Common Pleas* refused to set it aside on that account (*t*); but in a later case, it was held by the Court of *King's Bench* that interest could not be allowed upon the price of goods, though it was to be paid on a particular day (*u*). When, however, it is agreed that goods shall be paid for by a bill of exchange, payable at a particular date, and the purchaser neglects to give the bill, the vendor will be entitled to interest from the time the bill would have become due (*x*); and the vendee is equally liable where he has refused to accept the goods (*y*).

Where the purchaser, at an auction of a reversionary interest in bank-stock, made a deposit, and on the vendor failing to deduce a good title had recovered the deposit from the auctioneer, he was allowed to recover, in another action against the vendor, interest on the deposit (*z*).

(*t*) *Mountford* v. *Willes*, 2 Bos. & Pul. 337.

(*u*) *Gordon* v. *Swan*, 2 Campb. 429; and 12 East, 419.

(*x*) *Porter* v. *Palsgrave*, 2 Campb. 472; *Becher* v. *Jones*, 2 Campb. 428, accord; *Marshall* v. *Poole*, 13 East, 98, accord. See 1 Campb. 51; 17 Ves. 27; 15 East, 223.

(*y*) *Boyce* v. *Warburton*, 2 Campb. 480.

(*z*) *Farquhar* v. *Farley*, 7 Taunt. 592. See *De Bernales* v. *Wood*, 3 Campb. 258.

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THE END.

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